Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 26 JULY 29, 1992 No. 31

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Proposed Rulemaking
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Slip Op. 92–98 Through 92–102
Notice

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decision

19 CFR Part 134

(T.D. 92–70)

COUNTRY OF ORIGIN MARRING FOR IMPORTED PIPES, TUBES, AND FITTINGS

AGENCY: U.S. Customs Service, Department of The Treasury.

ACTION: Notice revising T.D. 86–15 on the country of origin marking requirements of pipes, tubes, and fittings of iron or steel covered by 19 U.S.C. 1304(c).

SUMMARY: As provided in 19 U.S.C. 1304(c), certain pipe and pipe fittings must be marked by specified methods (die stamping, cast-in-mold lettering, etchings, or engraving). In 1988 Congress amended 19 U.S.C. 1304(c) to permit alternative methods if, because of the nature of an article, it is technically or commercially infeasible to mark by one of the four methods. In such case, paint stenciling or an equally permanent method is permitted. Small diameter pipe, tube, and fittings may be marked by tagging the container or bundles. See 19 U.S.C. 1304(c)(2). This document revises T.D. 86–15, regarding the marking of pipe, tubes, and fittings to conform to 19 U.S.C. 1304(c)(2).

EFFECTIVE DATE: July 22, 1992.

FOR FURTHER INFORMATION CONTACT: Robert Dinerstein, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue, N.W. Washington, D.C. 20229 (202–566–2938)

BACKGROUND

Section 207 of the Trade and Tariff Act of 1984, (Pub. L. 98–573), amended 19 U.S.C. 1304 to require, without exception, that all pipe, tube, and pipe fittings of iron or steel must be marked to indicate the proper country of origin by means of die stamping, cast-in-mold lettering, etching or engraving. 19 U.S.C. 1304(c). However, after the enactment of Section 207, it was brought to the attention of Customs that certain pipe and pipe fittings of iron or steel cannot be marked by any of

the methods prescribed by the section without rendering such articles unfit for the purpose for which they were intended. Customs solicited comments on this subject, and issued T.D. 86–15 published in the Federal Register on February 5, 1986, 51 FR 24, setting forth certain categories of articles which may be marked by alternative methods. For certain categories of articles, paint stenciling was the requisite method. For other categories, paint stenciling or tagging of the bundles or the containers was permitted. These categories include thin-walled pipes and fittings, small-diameter pipes and fittings, other fittings, line pipe, coated pipes, and spun iron pipe. These categories of articles are described in detail in T.D. 86–15. In addition, for ornamental pipes, tube, and fittings of all types, having a highly polished surface, T.D. 86–15 permits marking by means of a durable tag or sticker securely affixed or marking the protective wrapper.

In 1988 Congress amended 19 U.S.C. 1304(c) to allow for alternative methods of marking only if, because of the nature of an article it is technically or commercially infeasible to mark by one of the four prescribed methods. In such case, "the article may be marked "by an equally permanent method of marking such as paint stenciling or in the case of small diameter pipe tube and fittings, by tagging the containers or bundles." (19 U.S.C. 1304(c)(2), emphasis added).

In enacting 19 U.S.C. 1304(c)(2), Congress overrode Customs determination to allow the country of origin marking of certain types of pipes, tubes, and fittings by tagging of bundles or containers for pipe other than small diameter pipe. As the emphasized language makes clear marking by tagging of bundles is permissible only in the case of small diameter. Pipe, tubes and fittings which cannot be marked by a prescribed method must be marked by "paint stenciling or a equally permanent method." We do not consider tagging the containers or bundles an equally permanent method marking as paint stenciling. Therefore, marking pipe, tube, and fittings by tagging the bundles or containers is only acceptable for small diameter product. In T.D. 86–15, Customs determined that small diameter product included fittings that have a nominal diameter of one-fourth inch or less and pipe with an inner diameter of 1.9 inches or less.

Accordingly, to conform with 19 U.S.C. 1304(c)(2), T.D. 86–15 is amended as follows: Only small diameter pipe, tube, or fittings (fittings with a nominal diameter one-fourth inch or less and pipes with an inner diameter of 1.9 inches or less) may also be marked by tagging the containers or bundles. Other articles listed in T.D. 86–15 must be marked by paint stenciling or an equally permanent method.

For articles not specified in T.D. 86–15, the burden is on the importer to satisfy Customs that it is technically or commercially infeasible to mark the article by one of the four methods designated in 19 U.S.C. 1304. Such articles must be marked by paint stenciling or an equally permanent method.

Customs recognizes that there might be some cases where paint stenciling or an equally permanent method of marking could damage the product and render it unfit for the purpose it was intended. If such a case arises, Customs will consider alternative methods of marking on a case by case basis.

Dated: July 15, 1992.

SAMUEL H. BANKS,
Assistant Commissioner,
Office of Commercial Operations.

[Published in the Federal Register, July 22, 1992 (57 FR 32621)]

U.S. Customs Service

General Notice

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 9–1992)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of June 1992 follow. The last notice was published in the CUSTOMS BULLETIN on July 1, 1992.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, Room 2104, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 566–6956.

Dated: July 13, 1992.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The lists of recordations follow:

07/07/92
12:14:24

U.S. CU
IPR RECORDATIO

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR
COP9200177	19920601	20120601	MINI AQUARIUM
COP9200178	19920609	20120609	HYP HAT ADVERTISEMENT #1
COP9200179	19920609	20120609	GLOBAL TEXT LASERJET PRIN
COP9200180	19920609	20120609	HYPNOTIC HATS ADVERTISEME
COP9200181	19920609	20120609	FORMS ETC. LASERJET PRINT
COP9200182	19920609	20120609	TEXTEQUATIONS LASERJET PR
COP9200183	19920609	20120609	MICROSOFT LASERJET PRINTE
COP9200184	19920609	20120609	POLISHED WORKSHEETS LASER
COP9200185	19920609	20120609	PERSUASIVE PRESENTATIONS
COP9200186	19920609	20120609	WORDPERFECT LASERJET PRIN
COP9200187	19920609	20120609	BAR CODES & MORE LASERJET
COP9200188	19920609	20120609	PROCOLLECTION LASERJET PR
COP9200189	19920609	20120609	HAPPY SOFTIE BEAR
COP9200190	19920609	20120609	JUNGLE LAND ANIMALS
COP9200191	19920609	20120609	FARM LAND ANIMALS
COP9200192	19920609	20120609	FUN FLAVORS SCENTED LIP G
COP9200193	19920610	20120610	MELODY IN MOTION (SANTA C
COP9200194	19920610	20120610	MELODY IN MOTION (1991 SA
COP9200195	19920610	20120610	MELODY IN MOTION (VICTORI
COP9200196	19920610	20120610	MELODY IN MOTION (WILLIE
COP9200197	19920610	20120610	MELODY IN MOTION (WILLIE
COP9200198	19920610	20120610	MELODY IN MOTION (WALL ST
COP9200199	19920610	20120610	MELODY IN MOTION (GRAND C
COP9200200	19920610	20120610	MELODY IN MOTION (BLACKSM
COP9200201	19920610	20120610	MELODY IN MOTION (WOODCHO
COP9200202	19920610	20120610	MELODY IN MOTION (HUNTER)
COP9200203	19920610	20120610	MELODY IN MOTION (LULL'A
COP9200204	19920610	20120610	MELODY IN MOTION (GRANDFA
COP9200205	19920610	20120610	MELODY IN MOTION (SHOEMAK
COP9200206	19920610	20120610	MELODY IN MOTION (ACCORDI
COP9200207	19920611	20120611	ROLL OVER KITTY
COP9200208	19920616	20120616	FISHER-PRICE DINOROAR T.C
COP9200209	19920616	20120616	FISHER-PRICE DINOROAR REX
COP9200210	19920616	20120616	FISHER-PRICE EASTER PUFFA
COP9200211	19920616	20120616	FISHER-PRICE DINOROAR BRU
COP9200212	19920616	20120616	FISHER-PRICE SLEEPYTIME P
COP9200213	19920616	20120616	FISHER-PRICE DRESS-UP PUF
COP9200214	19920616	20120616	FISHER-PRICE PUFFALUMP KI
COP9200215	19920616	20120616	FISHER-PRICE CHRISTMAS PU
COP9200216	19920616	20120616	FISHER-PRICE CHRISTMAS PU
COP9200217	19920616	20120616	FISHER-PRICE CHRISTMAS PU
COP9200218	19920616	20120616	FISHER-PRICE CHRISTMAS PU
COP9200219	19920622	20120622	FAIRY-TALE TROLL BALLERIN
COP9200220	19920622	20120622	FAIRY-TALE TROLL CLOWN (1
COP9200221	19920623	20120623	STREET FIGHTER II CHAMPIO
COP9200222	19920626	20120626	LAUGHING BEAR (PA9693)
COP9200223	19920626	20120626	MY VERY SOFT BABY (WHITE)
COP9200224	19920626	20120626	MY VERY SOFT BABY (WHITE)

USTOMS SERVICE
ONS ADDED IN JUNE 1992

PAGE 1
DETAIL

MSK	OWNER NAME	RES
	ZIE HONG PLASTICS CO., LTD.,	N
	HYPNOTIC HATS, LTD.	N
NTER CARTRIDGE ROM	HEWLETT-PACKARD COMPANY	N
ENT #2	HYPNOTIC HATS, LTD.	N
TER CARTRIDGE ROM	HEWLETT-PACKARD COMPANY	N
RINTER CARTRIDGE ROM	HEWLETT-PACKARD COMPANY	N
ER CARTRIDGE ROM	HEWLETT-PACKARD COMPANY	N
RJET PRINTER CARTRIDGE ROM	HEWLETT-PACKARD COMPANY	N
LASERJET PRINTER CARTRIDGE	HEWLETT-PACKARD COMPANY	N
NTER CARTRIDGE ROM	HEWLETT-PACKARD COMPANY	N
T PRINTER CARTRIDGE ROM	HEWLETT-PACKARD COMPANY	N
RINTER CARTRIDGE ROM	HEWLETT-PACKARD COMPANY	N
	HIP YICK INTERNATIONAL	N
	HIP YICK INTERNATIONAL, INC.	N
	HIP YICK INTERNATIONAL, INC.	N
GLOSS, MODEL 7020A	IMPERIAL TOY CORPORATION	N
CLAUS 1990)	HACO PRODUCTS CORPORATION	N
ANTA CLAUS)	HACO PRODUCTS CORPORATION	N
IA PARK CAROUSEL	HACO PRODUCTS CORPORATION	N
THE FISHERMAN)	HACO PRODUCTS CORPORATION	N
THE CONDUCTOR)	HACO PRODUCTS CORPORATION	N
TREET WILLIE)	HACO PRODUCTS CORPORATION	N
CAROUSEL)	HACO PRODUCTS CORPORATION	N
MITH)	HACO PRODUCTS CORPORATION	N
OPPER)	HACO PRODUCTS CORPORATION	N
)	HACO PRODUCTS CORPORATION	N
BY WILLIE)	HACO PRODUCTS CORPORATION	N
ATHER'S CLOCK)	HACO PRODUCTS CORPORATION	N
KER)	HACO PRODUCTS CORPORATION	N
ION BOY)	HACO PRODUCTS CORPORATION	N
	IHAYA CORPORATION	N
C.	FISHER-PRICE, INC.	N
X	FISHER-PRICE, INC.	N
ALUMP KIDS	FISHER-PRICE, INC.	N
UCE	FISHER-PRICE, INC.	N
PUFFALUMP	FISHER-PRICE, INC.	N
FFALUMP KID	FISHER-PRICE, INC.	N
ID GREG	FISHER-PRICE, INC.	N
UFFALUMP REINDEER	FISHER-PRICE, INC.	N
UFFALUMP PUPPY AND STOCKING	FISHER-PRICE, INC.	N
UFFALUMP DRUMMER BEAR	FISHER-PRICE, INC.	N
UFFALUMP CAROLER	FISHER-PRICE, INC.	N
NA (5" TALL)	HIP YICK INTERNATIONAL, INC.	N
13 1/2" TALL)	HIP YICK INTERNATIONAL, INC.	N
ON EDITION	CAPCOM CO., LTD.	N
	T.L. PRODUCTS' PROMOTING CO.,LTD	N
) #5132	PLAYSKOOL, INC.	N
) #5132	PLAYSKOOL	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MS
COP9200225	19920626	20120626	MY VERY SOFT BABY (BLACK) #
COP9200226	19920629	20120629	MY VERY SOFT BABY (BLACK) #
SUBTOTAL RECORDATION TYPE			50
TMK9200319	19920608	20071215	PETERS & ASHLEY
TMK9200320	19920608	19941029	JOHN HENRY
TMK9200321	19920608	20040310	HARNESS HOUSE
TMK9200322	19920608	19941029	MANHATTAN
TMK9200323	19920608	20060930	MANHATTAN
TMK9200324	19920608	19951026	MANSCO
TMK9200325	19920608	20060128	PETER ASHLEY
TMK9200326	19920608	19941224	SALANT
TMK9200327	19920608	20050709	STANLEY MORGAN INSPORTSWEAR
TMK9200328	19920608	20010512	TACO
TMK9200329	19920608	19930313	VERA
TMK9200330	19920608	19930313	PRIME TIME
TMK9200331	19920608	20091003	ESPRIT
TMK9200332	19920608	20110723	JEFF & KRISTI
TMK9200333	19920608	20110604	SAM & LIBBY AND DESIGN
TMK9200334	19920608	20090404	SAM & LIBBY
TMK9200335	19920608	19931218	MALE HEAD DESIGN
TMK9200336	19920608	20040428	FULL JOCKEY FIGURE DESIGN
TMK9200337	19920608	20010221	HALF JOCKEY FIGURE DESIGN
TMK9200338	19920608	20081011	JOCKEY FOR HER
TMK9200339	19920608	20090503	JOCKEY
TMK9200340	19920608	20110122	BARNEY & THE BACKYARD GANG
TMK9200341	19920608	20101211	BARNEY - DINOSAUR HEAD AND
TMK9200342	19920608	20100123	BARNEY
TMK9200343	19920608	20030412	HARLEY-DAVIDSON
TMK9200344	19920608	20120307	STANLEY BLACKER
TMK9200345	19920608	20020817	JAGBRA
TMK9200346	19920608	20010210	CROSS YOUR HEART
TMK9200347	19920609	20090912	COTTON BELT AND DEVICE
TMK9200348	19920609	20011112	WOKTOPPER
TMK9200349	19920609	20010608	PERSOL
TMK9200350	19920609	20010115	RACING DYNAMICS
TMK9200351	19920609	20090502	CORONADO
TMK9200352	19920609	19930703	PICTURE OF GOAT HEAD
TMK9200353	19920609	20010917	J'S WITHIN A TRIANGLE
TMK9200354	19920609	20020907	PHU-QUOC AND DESIGN
TMK9200355	19920610	20081018	SBK WITH DESIGN
TMK9200356	19920615	20041023	MISTOLIN
TMK9200357	19920615	20101113	KITCHEN KNIFE PLASTIC HANDL
TMK9200358	19920615	20020107	PEPE
TMK9200359	19920615	19970329	SICILIA
TMK9200360	19920615	20060211	SICILIA AND BOTTLE DESIGN
TMK9200361	19920615	20070616	CONFIGURATION OF A BOTTLE

SK	OWNER NAME	RES
#5133	PLAYSKOOL, INC.	N
#5133	PLAYSKOOL, INC.	N
	SALANT CORPORATION	Y
	FROST BROS. ENTERPRISES, INC.	Y
	SALANT CORPORATION	Y
	SALANT CORPORATION	Y
	SALANT CORPORATION	Y
	SALANT CORPORATION	Y
	SALANT CORPORATION	Y
	SALANT CORPORATION	Y
R WE TRUST	SALANT CORPORATION	Y
	SALANT CORPORATION	Y
	SALANT CORPORATION	Y
	SALANT CORPORATION	Y
	ESPRIT DE CORPORATION	Y
	SAM & LIBBY, INC.	N
	SAM & LIBBY, INC.	N
	SAM & LIBBY, INC.	N
	JOCKEY INTERNATIONAL, INC.	N
	JOCKEY INTERNATIONAL, INC.	N
	JOCKEY INTERNATIONAL, INC.	N
	JOCKEY INTERNATIONAL, INC.	N
	JOCKEY INTERNATIONAL, INC.	N
AND DESIGN	DLM, INC.	N
ARM DESIGN	DLM, INC.	N
	DLM, INC.	N
	HARLEY-DAVIDSON, INC.	N
	STANLEY BLACKER, INC.	N
	PLAYTEX APPAREL, INC.	N
	PLAYTEX APPAREL, INC.	N
	IM-SER S.R.L.	N
	OSCARMARE, INC.	N
	GIUSEPPE RATTI INDUSTRIA OTTICA	N
	RACING DYNAMICS INC.	Y
	PRODUCTOS DE LECHE CORONADO S.A.	N
	PRODUCTOS DE LECHE CORONADO S.A.	N
	BRIDGESTONE CORPORATION	N
	VIET-MY CORPORATION	N
	SBK RECORDS	N
	IBERIA FOODS CORPORATION	Y
LE	RUSSELL HARRINGTON CUTLERY, INC.	N
	PEPE (U.K.) LIMITED	N
	SIDAG AKTIENGESSELLSHCAFT	N
	SIDAG AKTIENGESSELLSHCAFT	N
	SIDAG AKTIENGESSELLSHCAFT	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR
TMK9200362	19920617	19930417	EDGEMARK AND DESIGN
TMK9200363	19920617	20031101	EXPLORER
TMK9200364	19920622	20120407	XGA
TMK9200365	19920622	20120424	CENTAUR
TMK9200366	19920623	20010616	GRP & DESIGN
TMK9200367	19920629	20081129	DIAMOND T.D.S. AND DESIGN
SUBTOTAL RECORDATION TYPE			49
TNM9200008	19920609	99999999	GRAND TEA COMPANY
SUBTOTAL RECORDATION TYPE			1
TOTAL RECORDATIONS ADDED THIS MONTH			100

CUSTOMS SERVICE
IONS ADDED IN JUNE 1992

PAGE 3
DETAIL

R MSK	OWNER NAME	RES
	GUTMANN CUTLERY CO., INC.	N
	GUTMANN CUTLERY CO., INC.	N
	INTERNATIONAL BUSSINESS MACHINES	N
	MONOTYPE CORPORATION PLC.	N
	GRP RECORDS, INC.	N
GN	ORLIMAR GOLF COMPANY	N
	THOMAS LI KA CHEUNG	N

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 101

CUSTOMS FIELD ORGANIZATION
BOUNDARIES OF WASHINGTON AND NORFOLK DISTRICTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to change the field organization of the Customs Service by realigning the Washington District to include Frederick, Clarke, and Prince William Counties, Virginia, and by removing these counties from the Norfolk District. This would permit the airport at Winchester, Virginia, and the airport and a number of Customs bonded warehouses at Manassas, Virginia, to be served by Customs personnel in the Washington District, who are more closely situated to such facilities than are Customs personnel in the Norfolk District.

DATE: Comments must be received on or before September 15, 1992.

ADDRESS: Comments (preferably in triplicate) should be submitted to and may be inspected at the Regulations and Disclosure Law Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Peg Reyen, Office of Workforce Effectiveness and Development, Office of Inspection and Control, (202)–566–8157.

SUPPLEMENTARY INFORMATION:

Background

As part of a continuing program to obtain more efficient use of its personnel, facilities and resources, and to provide better service to carriers, importers and the public, Customs proposes to redefine the boundaries of its Washington and Norfolk Districts. Specifically, the Washington District would be revised to include Frederick, Clarke and Prince William Counties, Virginia, which counties would then be removed from the Norfolk District within whose boundaries they are currently included. The proposal would thus essentially establish a corridor in the Northern Virginia area which would fall within the boundaries of the Washington District.

The proposed realignment would permit personnel from the Washington District (particularly Dulles Airport) to service the airport at Winchester, Virginia, when the need arises. At present, any aircraft clearances required at the Winchester Airport are being handled by an inspector from the Port of Richmond, Virginia (Norfolk District). This, however, is not in Customs best interests inasmuch as it takes approximately two hours to travel from Richmond to Winchester, but considerably less from Dulles. Furthermore, there are an airport and a number of Customs bonded warehouses in Manassas, Virginia, which could more effectively be served by personnel from Dulles Airport or the Port of Alexandria which is also in the Washington District. Notably, other operational services in any of the affected locations would not be materially compromised or impaired should the proposed realignment become effective.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to the Customs Service. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m., at the Regulations and Disclosure Law Branch, Headquarters, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C.

EXECUTIVE ORDER 12291 AND REGULATORY FLEXIBILITY ACT

Because this document relates to agency organization and management, it is not subject to E.O. 12291. Also, for the same reason, although Customs is soliciting public comments, no notice of proposed rulemaking is required under 5 U.S.C. 553(a)(2). Accordingly, this document is not subject to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

DRAFTING INFORMATION

The principal author of this document was Russell Berger, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 101

Customs duties and inspection, Exports, Imports, Organization and functions (Government agencies).

PROPOSED AMENDMENT

It is proposed to amend Part 101, Customs Regulations (19 CFR Part 101), as set forth below.

PART 101 – GENERAL PROVISIONS

1. The authority citation for Part 101 would continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 2, 66, 1202 (General Note 8, Harmonized Tariff Schedules of the United States), 1623, 1624.

2. It is proposed to amend the list of Customs regions, districts and ports of entry in § 101.3(b) in the following manner:

a. In the Southeast Region under the column headed "Area" directly opposite "Washington, D.C.", the description would be revised to read as follows: "The District of Columbia, the counties of Montgomery and Prince George's in the State of Maryland, the counties of Loudoun, Fairfax, Arlington, Frederick, Clarke, and Prince William, and the city of Alexandria in the State of Virginia, including any independent cities and towns within such boundaries of such counties."

b. In the Southeast Region under the column headed "Area" directly opposite "Norfolk, Va.", the description would be revised to read as follows: "The State of Virginia, except the counties of Loudoun, Fairfax, Arlington, Frederick, Clarke, and Prince William, and the city of Alexandria, including any independent cities and towns within the boundaries of such counties, and the State of West Virginia."

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: June 29, 1992.

PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 17, 1992 (57 FR 31677)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 92–98)

SUGIYAMA CHAIN CO., LTD., I&OC OF JAPAN CO., LTD., AND HKK CHAIN CORP. OF AMERICA, PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 90–11–00605

[Plaintiffs' 56.1 Motion for Judgment Upon the Agency Record is denied in part and remanded in part.]

(Dated June 30, 1992)

Tanaka Ritger & Middleton, (*Patrick F. O'Leary*), for Plaintiffs.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Velta A. Melnbrencis*); Office of Chief Counsel for Import Administration, United States Department of Commerce (*D. Michael Kaye*, Attorney-Advisor, Of Counsel), for Defendant.

MEMORANDUM OPINION

CARMAN, *Judge:* Plaintiffs move for judgment on the agency record pursuant to Rule 56.1 of the Rules of this Court. Defendant opposes the motion, but concedes that its finding of single corporate dumping margins for Plaintiffs' roller chain, rather than channel-specific dumping margins, and the imposition of new cash deposit rates, were not investigated, not supported by substantial evidence on the record, and not in accordance with law. Defendant requests a remand of this case to the United States Department of Commerce (Commerce) for the preparation of revised final results to show channel-specific dumping margins for those distributions that were investigated and to correct the cash deposit instructions issued to the Customs Service.

Plaintiffs challenge the final results of two administrative reviews respectively made by the United States International Trade Administration (ITA) of the Department of Commerce pertaining to roller chain, other than bicycle from Japan, for the following two years: April 1, 1987 through March 31, 1988 (1987–88 review period) set forth in *Final Results of Antidumping Duty Administrative Review: Roller Chain, Other Than Bicycle, from Japan*, 55 Fed. Reg. 42,602 (Oct. 22, 1990) and April 1, 1988 through March 31, 1989 (1988–89 review period) set forth in *Final Results of Antidumping Duty Administrative Review: Roller Chain, Other Than Bicycle, from Japan*, 55 Fed. Reg. 42,608 (Oct. 22, 1990).

Plaintiffs contend there are five issues of law that should be addressed by this Court, which are as follows:

Single Corporate Dumping Margin:

1. Whether the reporting by the ITA of a single corporate dumping margin combining the separate dumping margins computed for Plaintiff Sugiyama's (SY's) sales to Plaintiff I&OC of Japan Co. (I&OC) and SY's sales through HKK Chain Corporation of America (HKK) was in accordance with law. Defendant concedes this issue and it is remanded to Commerce.

Application of Cash Deposit Rates:

2. Whether the directions by the ITA to the Customs Service, following the publication of the final results, to collect a cash deposit of estimated antidumping duties for shipments through Plaintiff SY's uninvestigated distribution channels were in accordance with law. Defendant concedes this issue and it is remanded to Commerce. Commerce is directed on remand to determine what deposits, if any, were collected on account of Plaintiffs' distribution channels that were not investigated.

Credit Expense Input Error Question:

3. Whether the foreign market value (FMV) calculations of the ITA were supported by substantial evidence on the record and otherwise in accordance with law where the home market credit expenses contained a computer error made by Plaintiff SY and reported to Commerce in Plaintiffs' July 27, 1990 prehearing brief.

Computer Programming Error Issue:

4. Whether the ITA's foreign market value determinations were supported by substantial evidence on the record and otherwise in accordance with law where the ITA made a programming error in selecting FMVs to be compared with certain purchase price sales.

Exchange Rate Lag Rule Issue:

5. Whether the refusal by the ITA to apply the exchange rate lag rule found in Commerce Department Regulations 19 C.F.R. § 353.60(b) (1990) for the period October 28, 1987 through March 31, 1988 was supported by substantial evidence on the record and otherwise in accordance with law.

BACKGROUND

On September 21, 1989, Commerce transmitted questionnaires covering the respective review periods to the United States Embassy in Tokyo for delivery to Plaintiffs. Administrative Record Document (AR Doc.), Reel (R) 1, Frame (F) 137. Specific instructions for calculating home market credit expense and product control designation were included with the questionnaires. AR Doc. R1 F174, F216.

Plaintiff SY submitted on December 29, 1989, its initial questionnaire response which included in narrative form a specific methodology

used by SY in calculating home market credit expenses and computer tapes of home market and United States sales. AR Doc. R1 F265–66; AR Doc. Confidential (Conf.) R2, F83A, F93A.

Plaintiff SY, after having advised Commerce that SY was experiencing problems with the preparation of its computer tapes, requested an extension of time to file the tapes which were ultimately filed with Commerce in a corrected and/or revised form on January 5, 1990. AR Doc. R1 F310, F313.

Commerce issued on March 2, 1990, a deficiency letter to Plaintiff SY, requesting supplemental information, clarification of the methodology used to derive home market credit expense, and information pertaining to product comparisons (product concordance). AR Doc. R1 F319, F328, F332.

Plaintiff SY requested on April 2, 1990, the deadline for submission of responses to the deficiency letter, additional time to compile revisions of its computer tapes. This extension was granted by Commerce. AR Doc. R1 F366, F370. On April 9, 1990, Plaintiff SY filed its response to the deficiency letter, in which SY proposed new formulas for calculating home market credit expense (AR Doc. Conf. R2 F354A–55A, F389A–90A) and submitted new computer tapes that were used by Commerce in calculating dumping margins. AR Doc. Conf. R2 F193A. The response of April 9, 1990, failed to discuss Commerce's request for product concordance data.

Notices of the respective preliminary results of both reviews were published on June 27, 1990. 55 Fed. Reg. 26,243 (1990) (1987–88 review period); 55 Fed. Reg. 26,240 (1990) (1988–89 review period). Plaintiffs filed on July 27, 1990, comments pertaining to the preliminary results. AR Doc. Conf. R2 F500A. Plaintiffs discussed the issue of utilizing only one corporate dumping rate, requested Commerce to "correct all of the CREDITH" (home market credit expense) figures on SY's tape (AR Doc. Conf. R2 F508A–510A), requested Commerce to grant a level of trade adjustment in accordance with 19 C.F.R. § 353.58 (AR Doc. Conf. R2 513A), and requested Commerce to apply the exchange rate lag rule (AR Doc. Conf. R2 F521A) in accordance with 19 C.F.R. § 353.60. Plaintiffs, however, did not comment upon any computer programming error, nor were there any comments pertaining to product comparisons. Moreover, Plaintiff SY did not submit any computer tapes reflecting what it considered to be correct home market credit expense.

Commerce published on October 22, 1990, notices of the final results of the respective administrative reviews, in which it addressed the issues raised by Plaintiffs. 55 Fed. Reg. 42,602 (1990) (1987–88 review period); 55 Fed. Reg. 42,608 (1990) (1988–89 review period).

Commerce, in regard to the question of the single dumping margin, declined in both final notices to make any adjustment. Commerce in this action, as already noted, concedes this issue. Commerce refused to correct the CREDITH figures submitted on Plaintiff SY's tapes or to employ the specific exchange rate lag rule, or to acquiesce in Plaintiffs'

request for a level of trade adjustment. Commerce did not address product comparisons in the notice, presumably because Plaintiffs never raised the question of a programming error in selecting sales for foreign market value purposes.

On November 1, 1990, Plaintiffs filed with Commerce a letter requesting Commerce to correct what the letter identified as two "ministerial errors." AR Doc. Conf. R2 F641A. The first "error" pertained to home market credit expense, and the second "error" referred to a computer programming error in regard to choice of home market sales. The letter did not state where the error occurred in the program. The letter also discussed the denial by Commerce of the requested level of trade adjustment. AR Doc. Conf. R2 F644A.

On November 21, 1990, Plaintiffs commenced this action.

Standard of Review

This Court's jurisdiction to review the final results of an antidumping duty administrative review is limited to determining whether the final results are supported by substantial evidence on the administrative record and are otherwise in accordance with the law. 28 U.S.C. § 1581(c) (1988); 19 U.S.C. § 1516a(b)(1)(B) (1988).

Substantial evidence "is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938). The possibility of drawing two inconsistent conclusions from the same evidence does not prevent the agency's finding from being supported by substantial evidence. *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620 (1966). "Rather, the court will sustain the determination if it is reasonable and supported by the record as a whole, including whatever fairly detracts from the substantiality of the evidence." *Negev Phosphates, Ltd. v. United States,* 12 CIT 1074, 1077, 699 F. Supp. 938, 942 (1988) (citing *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951).

Furthermore, Commerce's interpretation of the statutes it administers is accorded substantial weight. *Floral Trade Council v. United States,* 8 Fed. Cir. (T) ____, ____, 888 F.2d 1366, 1368 (1989) (citing *Zenith Radio Corp. v. United States,* 437 U.S. 443, 450–51 (1978) and *American Lamb Co. v. United States,* 4 Fed. Cir. (T) 47, 54, 785 F.2d 994, 1001 (1986)). In determining whether to sustain the agency's construction of the antidumping statute or regulation, the Court need not find Commerce's interpretation to "be the *only* reasonable interpretation, or the one which the Court views as the most reasonable. *ICC Indus., Inc. v. United States,* 5 Fed. Cir. (T) 78, 85, 812 F.2d 694, 699 (1987) (quoting *Consumer Prods. Div., SCM Corp. v. Silver Reed America, Inc.,* 3 Fed. Cir. (T) 83, 90, 753 F.2d 1033, 1039 (1985)). Commerce's interpretation of the statute is to be sustained if it "is 'sufficiently reasonable' to be accepted by a reviewing court." *Zenith,* 437 U.S. at 450–51. This court should not reject the agency's interpretation of a statute without com-

pelling reasons to do so. *Wilson v. Turnage*, 791 F.2d 151, 156 (Fed. Cir.), *cert. denied*, 479 U.S. 988 (1986).

The Court now turns to the contested issues presented.

Discussion

Credit Expense Input Error Question:

Plaintiffs, in a prehearing administrative brief, subsequent to the preliminary findings, reported that the computer tapes of Plaintiff SY contained erroneous credit expense figures for sales pertaining to SY's related home market distribution. Commerce declined to make the correction on two grounds: (1) the figures on the tapes were inconsistent with the formulas in the narrative questionnaire response, and (2) the requested change was untimely.

Plaintiffs assert that the first ground is "simply not true," because the changes do not represent new data, and argue, alternatively, if the changes did represent new data, then the position of Commerce was inconsistent with previous decisions of this Court. *See, e.g., Tehnoimportexport Co. v. United States*, 15 CIT ____, 766 F. Supp. 1169 (1991); *Koyo Seiko Co. v. United States*, 14 CIT ____, 746 F. Supp. 1108 (1990), *Serampore Indus. Pvt. Ltd. v. United States*, 12 CIT 825, 696 F. Supp. 665 (1988), *aff'd on remand*, 13 CIT 117, 705 F. Supp. 602 (1989).

Defendant points out that the burden for the creation of an adequate record rests with Plaintiffs. *See Chinsung Indus. Co. v. United States*, 13 CIT 103, 106, 705 F. Supp. 598, 601 (1989). Defendant observes that the statutory scheme makes clear that the general rule is that information is to be submitted during an administrative proceeding, not subsequently. Plaintiffs were in the best position to organize their own sales expense data and prepare, check, and verify the information they supplied to Commerce; Commerce was not privy to the private business affairs of Plaintiffs. Commerce, Defendant maintains, in large part, must rely upon the factual data which is submitted to it by foreign importers and others at the administrative level. Commerce receives numerous and voluminous submissions of such data during an administrative proceeding. Not uncommonly, submissions contain various discrepancies which would be entirely impracticable for Commerce to sort out. Because Plaintiff SY submitted several different versions of its response, Commerce would have been required to make a manual comparison of thousands of data entries. Even if Commerce possessed the personnel to identify errors Plaintiffs made in their data base within the statutory deadlines, Commerce would have no basis for deciding which portion of the submission was correct or erroneous.

This Court observes that if the burden of compiling, checking, rechecking, and finding mistakes in the submission of Plaintiffs were placed upon Commerce, it would transform the administrative process into a futility.

Defendant argues that if Plaintiffs did not have the time or resources to proofread its own data before submitting it, it should have at least

proofread after submission and promptly notified Commerce about what errors and corrections should have been made. Plaintiffs waited until Commerce relied upon the data and completed the preliminary results and was preparing for its final determination before claiming the errors occurred. The record indicates Plaintiffs waited three and one-half months between April 9, 1990, the filing of their new questionnaire responses and tapes (AR Doc. Conf. R2 F193A) and July 27, 1990, when it filed its prehearing comments (AR Doc. Conf. R2 F500A) to bring the errors to the attention of Commerce.

After a spot check of the formula that allegedly contained the errors, Commerce concluded that the narrative questionnaire response and the credit calculations reported on Plaintiff SY's tapes were consistent. It was not until *after* publication of the final results that Plaintiffs clarified their prior request. Thus, Plaintiffs' failure to explain the alleged errors contributed to Commerce's inability to detect them.

This Court notes Plaintiffs had substantial cooperation from Commerce in securing extensions of time to file documents at the administrative level as outlined copiously in the section captioned "Background" in this opinion. Given Plaintiffs' failure to specify the location or nature of the alleged errors in question during the administrative proceedings and their untimeliness in submitting clarification after the publication of the final results, this Court finds that the offering was properly rejected as untimely.

This Court cannot permit Plaintiffs to stymie the work that Commerce has been mandated to perform by Congress on account of what appears to be the slovenly submission of data. Commerce has statutory deadlines that must be met. Plainly, it would be an impossible mission, and there would be, in any event, inadequate resources to enjoin Commerce to ensure that Plaintiff submitted data in a form satisfactory to Commerce. The agency is not well-suited for that job. Plaintiffs must prepare their own data accurately. They cannot expect Commerce to be a surrogate to guarantee all of their submissions are correct.

Nevertheless, Plaintiffs cite this Court's decisions in *Serampore, Koyo*, and *Tehnoimportexport*, in support of a remand.

In *Serampore*, the Court, while affirming a portion of the remand results, granted a second remand for Commerce to determine whether an alleged clerical computer input error had been made, notwithstanding that the error was apparently not within the scope of the first remand and not raised in the previously underlying decision. 12 CIT at 834, 696 F. Supp. at 673. The Court noted that it was "loathe to affirm a determination that might be based on a questionable record." *Id.* If Commerce agreed there was such an error, it was directed to make appropriate corrections. *Id.*

In *Koyo*, the Court held that Commerce unlawfully refused plaintiffs' request for correction of certain clerical and transcription errors present in the computer data it submitted to Commerce to be employed by Commerce in preparing its final determination. 14 CIT at ____, 746 F.

Supp. at 1111. The Court noted that the limited burden that would be imposed upon the ITA, by virtue of a remand ordering the correction of input errors, was far outweighed by the preference for accuracy in final dumping determinations. *Id.*

In *Tehnoimportexport,* the Court, in reviewing a final antidumping determination, found that where a plaintiff's mistake was so obvious, ITA's failure to correct it was an abuse of discretion. The Court directed Commerce on remand to make any adjustments that the corrections might require, noting that the additional calculations would not overburden the ITA, because there was, in any event, to be a remand for recalculation of packing costs. 15 CIT ____, 766 F. Supp. at 1179.

The cases cited by Plaintiff allowing corrections of data can easily be distinguished from the instant case. The errors in the instant case do not appear to be inadvertent clerical or transcription errors. The alleged errors reported on the tape might be Plaintiffs' failure to correctly calculate their home market credit expense or a failure to correctly report to Commerce the formula actually used on its computer tape and printout. One possibility is that Plaintiffs may have, in fact, used several different formulas to arrive at their credit expense results. It is also possible that Plaintiffs used one formula for the narrative response and another for calculation of the credit figures which appeared on the tape. Another possibility is that, in the continuum of revising tapes, Plaintiffs incorporated obsolete data. The errors may have been substantial and substantive from Plaintiffs' point of view. They were certainly not inadvertent clerical or transcription mistakes. They were not obvious. If they were, presumably Plaintiffs would have noticed them during the three-and-one-half month time period, between April 9, 1990 and July 27, 1990, referred to above.

If this Court were to approve of Plaintiffs' method of submissions, it might actually encourage others to manipulate figures and other data to get what it considered desired results from Commerce.

One might parry that because Commerce is to make other adjustments on another portion of a remand on this case, why not let them take care of these corrections in the interests of overall accuracy. If the Court were to adopt such a general policy, Commerce would be unnecessarily overburdened and litigants might tend to become slovenly with submitted data. Furthermore, it is not inconceivable that others might find convenient ways to unfairly manipulate data to skew the outcome of results. All proceedings must conclude. In *Koyo*, the Court noted:

> There can be no doubt that Congress intended final determinations to be precisely that. Indeed, if determinations were constantly subject to amendment, "it would be difficult to answer the question as to when a *final* determination would ever be made." *Badger-Powhatan Div. of Figgie Int'l, Inc. v. United States*, 10 CIT 241, 245, 633 F.Supp. 1364, 1369 (1986) (emphasis in original). The Court further acknowledges that the imposed deadlines must be strictly

adhered to if Commerce is to conduct antidumping investigations effectively.

14 CIT at ___, 746 F. Supp. at 1110.

This Court holds that Plaintiffs had ample time to make correct submissions and ample time to make any additions or corrections that were necessary. Because Plaintiffs did not make timely application to make the corrections, this Court holds Commerce did not abuse its discretion in refusing Plaintiffs the opportunity to make the corrections.

Computer Programming Error Issue:

It is urged by Plaintiffs that the final results by the ITA were skewed by a not easily detectible computer programming error that resulted in the computer frequently choosing a foreign market value based on sales at a different level of trade for comparisons with purchase price. Plaintiffs maintain that the asserted computer programming error was brought to the attention of Commerce by a letter from Plaintiff SY nine days after the publication of the final results and requires correction because it is a substantial and major error.

The procedures Commerce must follow during an administrative review in determining antidumping duties are set forth at 19 U.S.C. § 1675(a)(2) (1988), which provides in pertinent part as follows:

> **(2) Determination of antidumping duties**
>
> [T]he administering authority shall determine—
>
> (A) the foreign market value and United States price of each entry of merchandise subject to the antidumping duty order and included within that determination, and
>
> (B) the amount, if any, by which the foreign market value of each such entry exceeds the United States price of the entry.
>
> The administering authority * * * shall publish notice of the results of the determination of antidumping duties in the Federal Register, and that determination shall be the basis for the assessment of antidumping duties on entries of the merchandise included within the determination and for deposits of estimated duties.

Provision for merchandise comparison in the two markets is found at 19 U.S.C. § 1677(16) (1988), which provides in pertinent part:

> **(16) Such or similar merchandise**
>
> The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:
>
> (A) The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> (B) Merchandise—
>
> (i) produced in the same country and by the same person as the merchandise which is the subject of the investigation,

(ii) like that merchandise in component material or materials and in the purposes for which used, and

(iii) approximately equal in commercial value to that merchandise.

(C) Merchandise –

(i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,

(ii) like that merchandise in the purposes for which used, and

(iii) which the administering authority determines may reasonably be compared with that merchandise.

See 19 C.F.R. § 353.58 (1990).

Plaintiffs urge that Commerce, consistent with the statute, was obliged to compare home market sales and United State sales at the same level of trade. According to Plaintiffs, if there was a sale to the United States during July 1988 and there were no sales to be compared to establish foreign market value on home sales in July, then the computer should have selected June 1988 for comparison in applying the so-called "90–60 day rule." For example, if no June sales existed, then the computer, in an order of priority, should have selected a foreign market value based on (1) August 1988 sales, (2) May 1988 sales, (3) September 1988 sales, or (4) April 1988 sales.

Plaintiffs urge that this procedure was followed for exporter sales prices; however, while the same procedure was followed in some, it was not followed in all comparisons of home market sales with purchase price sales. According to Plaintiffs, in those instances where it was not done, the computer emphasized the same month over the level of trade.

Plaintiffs contend that the inconsistent treatment of export sales price transactions and purchase price transactions reflect an unintentional programming error by Commerce that resulted in the use by the ITA of home market sales comparisons with export sales transactions in the same month, regardless of the level of trade.

This Court notes that the comparison methodology used by Commerce must be sustained unless it is unreasonable. *Melamine Chems., Inc. v. United States*, 2 Fed. Cir. (T) 57, 60–61, 732 F.2d 924, 928 (1984); *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404, 636 F. Supp. 961, 965–66 (1986), *aff'd*, 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987).

This Court holds that the methodology enunciated cannot be sustained and a remand must issue. Commerce acknowledges that in its original Memorandum it erroneously stated that the computer was programmed to select comparable sales for calculating foreign market value based upon product control numbers designated by Plaintiffs. Defendant's Supplemental Memorandum at 3. (Def. Supp. Mem.) Commerce indicates as follows:

> After reviewing [Plaintiffs'] reply, we recognized that our explanation was erroneous. * * * [W]hile the administrative record reveals that there appear to have been differences in the selection of

> foreign market values for comparisons with exporter's sales price transactions and with purchase price sales, it does not reveal the reasons for these differences. * * * [After asserting that Plaintiffs have failed to exhaust their administrative remedies by not bringing the errors to the attention of Commerce until after publication of the final results, Commerce concludes] the proper course of action would be to remand the foreign market value selection issue to Commerce so that it could examine it, give the reasons for its actions, and, if warranted, make any necessary corrections in the computer programming instructions.

Id.

This Court, while rejecting out of hand the argument of Commerce pertaining to the exhaustion of administrative remedies as somewhat disingenuous in light of the circumstances of this case, nevertheless commends Counsel for the Defendant for bringing this error of Commerce to the attention of the Court.

Exchange Rate Lag Rule Issue:

Plaintiffs contend that shortly after the issuance of the preliminary results, at the first opportunity, Plaintiffs requested Commerce to apply a 90-day lag in exchange rates for sales made between October 28, 1987 and March 31, 1988. AR Doc. Conf. R2 F521A–23A. According to Plaintiffs, their request was made consistent with *Industrial Quimica Del Nalon, S.A. v. United States* to apply 19 C.F.R. § 353.60(b) to an administrative review. 13 CIT 1055, 1063, 729 F. Supp. 103, 110 (1989), *appeal denied* (on interlocutory issue only) 8 Fed. Cir. (T) ____, 904 F.2d 44 (1990), *aff'd on results of first remand*, Slip. Op. 91–43 at 10–11 (May 24, 1991).

Commerce maintains that even if this Court were to decide 19 C.F.R. § 353.60(b) is applicable to administrative reviews, the specific rule should not be invoked because Plaintiffs have failed to establish the existence of the elements necessary for invocation of the rule. Commerce requests, furthermore, that this Court not follow decisions of the Court that extend the applicability of the specific rule to administrative reviews.

The issue then is whether the 90-day exchange lag rule applies to administrative reviews. If this Court finds that the 90-day lag rule applies to administrative reviews, the Court must then decide whether the Plaintiffs followed the applicable measures mandated by 19 C.F.R. § 353.60(b). 19 C.F.R. § 353.60 provides in full:

> (a) *Rule for conversion.* The Secretary will convert, under section 522 of the Act (31 U.S.C. 5151(c)),[1] a foreign currency into the equivalent amount of United States currency at the rates in effect

[1] 31 U.S.C. § 5151 (1988) provides in pertinent part:

(c) Except as provided in this section, conversion of currency of a foreign country into United States currency for assessment and collection of duties on merchandise imported into the United States shall be made at values published by the Secretary under subsection (b) of this section for the quarter in which the merchandise is exported.

(d) If the Secretary has not published a value for the quarter in which the merchandise is exported, or if the value published by the Secretary varies by at least 5 percent from a value measured by the buying rate at noon on the day the merchandise is exported, the conversion of the currency of the foreign country shall be made at a value –

continued

> on the dates described in § 353.46, § 353.49, or § 353.50, as appropriate.
>
> (b) *Special rules for investigations*. For purposes of investigations, producers, resellers, and importers will be expected to act within a reasonable period of time to take into account price differences resulting from sustained changes in prevailing exchange rates. When the price of the merchandise is affected by temporary exchange rate fluctuations, the Secretary will not take into account in fair value comparisons any difference between United States price and foreign market value resulting solely from such exchange rate fluctuation.

For many years, the ITA applied this special rule only in original less than fair value investigations. *Melamine*, 2 Fed. Cir. (T) at 57, 732 F.2d at 924; *General Housewares Corp. v. United States*, 16 CIT ____, 783 F. Supp. 1408 (1992); *Pistachio Group of the Ass'n of Food Indus., Inc. v. United States*, 11 CIT 668, 671 F. Supp. 31 (1987), *aff'd on remand*, 12 CIT 416, 685 F. Supp. 848 (1988); *Luciano Pisoni Fabbrica Accessori Instrument Musiciali v. United States*, 10 CIT 424, 640 F. Supp. 225 (1986). In *Melamine*, the Court upheld ITA's use of a 90-day lag rule for selecting exchange rates and stated:

> Though the CIT noted that the United States had cited "no authority for using a 90-day lag rule", that authority stems from Commerce' duty to enforce fairly the antidumping laws by determining whether LTFV sales are or are *not* occurring. The purpose of the antidumping law, as its name implies, is to discourage the practice of selling in the United States at LTFV by the imposition of appropriately increased duties. That purpose would be ill-served by application of a mechanical formula to find LTFV sales, and thus a violation of the antidumping laws, where none existed. A finding of LTFV sales based on a margin resulting *solely* from a factor beyond the control of the exporter would be unreal, unreasonable, and unfair.

2 Fed. Cir. (T) at 67–68, 732 F.2d at 933 (emphasis in original); *see General Housewares*, 16 CIT at ____, 783 F. Supp. at 1412.[2]

The decision of the Federal Circuit in *Melamine* reports ITA's perception of the purpose and application of § 353.60(b) as follows:

> Antidumping investigations are meant to determine whether prices of merchandise sold in the United States are at less than "fair value." When exchange rates are fluctuating substantially, a given dollar price of a product in the United States could change technically from fair to "unfair" literally from day to day, even if the for-

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(1) equal to the buying rate at noon on the day the merchandise is exported; or
(2) prescribed by regulation of the Secretary for the currency that is equal to the first buying rate certified for that currency by the Federal Reserve Bank of New York under subsection (e) of this section in the quarter in which the merchandise is exported, but only if the buying rate at noon on the day the merchandise is exported varies less than 5 percent from the buying rate first certified.

(e) The Federal Reserve Bank of New York shall decide the buying rate and certify the rate to the Secretary. The Secretary shall publish the rate at times and to the extent the Secretary considers necessary.

[2] The Court in *General Housewares* found that "the plaintiffs [did] not establish[] that the margins they contest[ed] * * * were caused by factors beyond their control, and the court thus conclude[d] that the ITA's reliance on subsection (a) rather than (b) of 19 C.F.R. § 353.56 [now codified at § 353.60] was supported by substantial evidence on the record and in accordance with law." 16 CIT at ____, 783 F. Supp. at 1414.

> eign price of the product, [sic] denominated in the foreign currency, also remained constant. This result is not called for by the language or purpose of the Act. It would be unrealistic to expect business to change prices instantaneously to take account of fluctuating exchange rates. * * *
>
> The regulation, then, allows a reasonable period in which the business may take sustained exchange rate fluctuations into account. The regulation further instructs that temporary fluctuations should not be the sole basis for determinations of less than fair value sales. Businesses are to be given time to assess whether one currency has truly appreciated against another before changing their pricing practices.

2 Fed. Cir. (T) at 65–66, 732 F.2d at 932 (quoting *Melamine in Crystal Form from the Netherlands; Antidumping: Amendment of Final Determination*, 45 Fed. Reg. 29,619, 29,620 (May 5, 1980)).

The first time that § 353.60(b) was held applicable to administrative reviews was in *Quimica*. The Court in *Quimica* held that 19 C.F.R. § 353.60(b) "applies with equal force to review determinations, as well as fair value investigations." 13 CIT at 1063, 729 F. Supp. at 110; *accord Brother Indus., Ltd. v. United States*, 15 CIT ____, 771 F. Supp. 374 (1991).[3] In *Quimica* the Court concluded that it was not in accordance with law for the ITA to restrict application of the special rules under § 353.60(b) only to original LTFV investigations. The Court found that the special rule of § 353.60(b) applied to administrative reviews, but left to Commerce to decide when to treat an exchange rate fluctuation under § 353.60(b) or under a circumstance of sale adjustment under 19 C.F.R. § 353.56 (1990). 19 U.S.C. § 1677b(a)(4) (1988).[4] The Court reasoned that "it makes little sense to apply a regulation [§ 353.60(b)] only during

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[3] In *Brother Indus., Ltd. v. United States*, 15 CIT ____, ____, 771 F. Supp. 374, 384–86 (1991), the plaintiffs contested the final result of an antidumping duty administrative review of portable electric typewriters from Japan. The plaintiffs claimed that ITA's 1985–86 determination "was distorted by 'unprecedented and rapid' changes in the exchange rate [*i.e.*, the appreciation of the Japanese yen] which should have been accounted for under 19 C.F.R. § 353.56(b) [now codified at § 353.60(b)]." *Id.* at 385 (footnote omitted). Although the plaintiffs did not exhaust their administrative remedies by raising this issue during the ITA proceedings, the Court, nevertheless, granted a remand, following the holding in *Quimica*, 13 CIT at 1055, 729 F. supp. at 103.

[4] Commerce has on occasion employed a circumstance of sale adjustment as the proper vehicle where there are currency fluctuations due to exchange rates. *See Final Determinations of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany*, 54 Fed. Reg. 18,992, 19,085–86 (May 3, 1989).

Another example can be found in *Budd Co., Wheel & Brake Div. v. United States*, 14 CIT ____, 746 F. Supp. 1093, 1098–99 (1990). This Court held that Commerce's final determination to use a circumstance of sale adjustment to reduce foreign market value by devaluation of Brazilian cruzeiro between date of sale and date of shipment was reasonable and supported by substantial evidence on the record. This Court pointed out in *Budd* the Federal Circuit's emphasis that "fairness is the touchstone of Commerce's duty in enforcing the antidumping laws." *Id.* at ____, 746 F. Supp. at 1099. Furthermore in *Budd*, this Court agreed with Commerce "that to the extent the circumstance of sale adjustment conflicted with the currency conversion regulations, it was appropriate for Commerce to choose to effectuate the primary statutory purpose in favor of fair determinations based on contemporaneous comparisons." *Id.* at ____, 746 F. Supp. at 1100 (citations omitted). The Court further pointed out that Commerce conceded that it "has 'normally limited [circumstance of sale] adjustments to those instances in which the differences in selling practices between the United States and home markets are directly related to the sales under consideration.'" *Id.* at ____, 746 F. Supp. at 1101.

Nevertheless, in *Budd* Commerce argued that they "are not precluded from using [the circumstance of sale] provision to achieve a result that reflects economic reality and is consistent with the basic purpose of the Act." *Id.* In fact, Commerce supported its use of circumstance of sale adjustment in exchange rate situations in *Amended Final Determination of Sales at Less Than Fair Value and Amended Antidumping Duty Order; Tubeless Steel Disc Wheels from Brazil*, 53 Fed. Reg. 34,567 (Sept. 7, 1988), when it stated that "our regulations have long recognized that special circumstances may require us to compensate where a strict application of our currency rules leads to an incorrect result. Application of a circumstance of sale adjustment in these special situations achieves the correct and fair result." *Id.*

the determination phase (when only an estimate is necessary), and not during the assessment phase (which calls for a similar but more accurate calculation)." *Quimica*, 13 CIT at 1065, 729 F. Supp. at 111.

The problem is that § 353.60(b) only applies to investigations. The term investigation in § 353.60(b) is defined in 19 C.F.R. § 353.2(1) (1990) as follows:

> An "investigation" begins on the date of publication of notice of initiation of investigation and ends on the date of publication of the earliest of (1) notice of termination of investigation, (2) notice of rescission of investigation, (3) notice of a negative determination that has the effect of terminating the proceeding, or (4) an order.

This Court is reluctant to tamper with the 353.60(b) regulation, which on its face appears to clearly apply only to original fair value investigations and not to administrative reviews.

Moreover, as the ITA asserted in *Quimica*, "[t]he rationale for denying application of the special rule to administrative reviews * * * is that under a fair value investigation, interested parties are 'on notice' that prices will be monitored for purposes of those reviews. A respondent possesses the means to regulate its prices and must bear the risk of avoiding dumping margins due to currency changes." *Quimica*, 13 CIT at 1062–63, 729 F. Supp. at 110. This Court finds this reasoning sound.

Therefore, it appears that this notice precludes the necessity to implement the special rule during the assessment phase (administrative review). The special rule requires that "those covered by an antidumping-duty order will factor their expectations as to future rates of exchange into their pricing." *Brother Indus.*, 15 CIT at ____, 771 F. Supp. at 385. If unable to do so, "[c]laimants have to demonstrate on the record that the exchange-rate behavior was beyond their ability to compensate." *Id.* (citations omitted). For the reasons set forth in this opinion, this Court declines to follow the holding in *Quimica* that 19 C.F.R. § 353.60(b) applies to administrative reviews. Therefore, this Court finds that the ITA acted in accordance with the law.

Conclusion

This Court orders that this action be remanded to Commerce for the preparation of revised final results to show channel-specific dumping margins for those distributors that were investigated and that Commerce is directed to determine what deposits, if any, were collected on account of Plaintiffs' distribution channels that were not investigated. Both parties agree that any overpayment is to be refunded upon liquidation. Furthermore, it is ordered that the case be remanded to Commerce for reexamination of the selection of home market models for comparisons with purchase price sales and exporter's sales price transactions. Commerce is directed to make any selection corrections required and to explain its rationale for any such selection correction. Plaintiffs' 56.1 Motion for Judgment Upon the Agency Record is denied in all other respects.

(Slip Op. 92–99)

KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., PLAINTIFFS *v.* UNITED STATES AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, TORRINGTON CO. AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

Court No. 91–08–00591

Plaintiffs move pursuant to Rule 56.1 of the Rules of this Court for judgment on the agency record. Plaintiffs object to (1) The Department of Commerce, International Trade Administration's ("Commerce") methodology used to calculate assessment rates; (2) Commerce's decision to classify Koyo's home market post-sale price adjustments as indirect selling expenses; (3) Commerce's exclusion of home market sales to related parties in its calculation of foreign market value; (4) Commerce's use of home market samples in calculating foreign market value; (5) Commerce's decision to subtract Koyo's U.S. direct selling expenses from U.S. price; and (6) Commerce's comparison of sales across different levels of trade.

Held: Plaintiffs' motion is hereby granted in part and this case is remanded to Commerce to recalculate dumping margins in accordance with the instructions set forth in this opinion to reflect an adjustment of the foreign market value for direct selling expenses. Furthermore, plaintiffs' motion is denied in all other respects.

[Plaintiff's motion is denied in part, granted in part and remanded to ITA.]

(Dated June 30, 1992)

Powell, Goldstein, Frazer & Murphy (*Peter O. Suchman, Neil R. Ellis* and *Niall P. Meagher*) for plaintiffs.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*, Assistant Director, and *A. David Lafer*, Senior Trial Attorney); of counsel: *Stephen J. Claeys, Craig Giesze, D. Michael Kaye* and *Dean Pinkert*, Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendants.

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., John M. Breen* and *Geert De Prest*), for The Torrington Company, defendant-intervenor.

Frederick L. Ikenson, P.C. (*Frederick L. Ikenson, J. Eric Nissley, Larry Hampel* and *Joseph A. Perna, V*) for Federal-Mogul Corporation, defendant-intervenor.

OPINION

TSOUCALAS, *Judge:* Plaintiffs, Koyo Seiko Company, Ltd. and Koyo Corporation of U.S.A. ("Koyo"), move pursuant to Rule 56.1 for judgment on the agency record. This administrative review covers the period from November 9, 1988 through April 30, 1990. The preliminary results of this review were published in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts thereof from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Antidumping Duty Administrative Reviews,* 56 Fed. Reg. 11,186 (1991). The Department of Commerce, International Trade Administration ("Commerce" or "ITA"), preliminarily determined antidumping margins for Koyo to be .49% for ball bearings and .02% for cylindrical roller bearings. On July 11, 1991, the final results were published in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Final Results of Antidumping Duty Administrative Reviews,* 56 Fed. Reg 31,754 (1991) ("Final Re-

sults"). At this time, Commerce established dumping margins for Koyo of 9.82% for ball bearings and 1.45% for cylindrical roller bearings.

Koyo contests several actions undertaken by Commerce in calculating the final dumping margins. Specifically, Koyo objects to (1) Commerce's methodology used to calculate assessment rates; (2) Commerce's decision to classify Koyo's home market post-sale price adjustments as indirect selling expenses; (3) Commerce's exclusion of home market sales to related parties in its calculation of foreign market value; (4) Commerce's use of home market samples in calculating foreign market value; (5) Commerce's decision to subtract Koyo's U.S. direct selling expenses from U.S. price, rather than treating them as "circumstance of sale" adjustments and deducting them from foreign market value; and (6) Commerce's comparison of sales across different levels of trade.

Discussion

Pursuant to the Tariff Act of 1930, in reviewing a final determination of Commerce, this Court must uphold that determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence has been defined as being "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *The Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990).

1. *Assessment Rates:*

Koyo claims that Commerce's establishment of assessment rates was contrary to law and unsupported by substantial evidence. In its investigation, Commerce employed separate methodologies for exporter sales price and purchase price transactions in order to arrive at appropriate assessment rates.

For purchase price sales, Commerce divided the total potential uncollected dumping duties for each importer by the total number of units sold to that importer. They did not divide by the number of units entered because they simply did not have this information. They assessed the resulting unit dollar amount against each unit of merchandise in each of that importer's entries under the relevant order during the review period.

For exporter's sales price, Commerce divided the total potential uncollected dumping duties by the total entered value of those reviewed sales for each importer.

Koyo claims that the total potential uncollected dumping duties represent the difference between foreign market value and total U.S. price

for the entries under review and that nothing in the antidumping law grants Commerce the latitude to assess duties on the basis of the ratio of sales data to the entered number of units. They further claim that the only lawful ratio by which to establish assessment rates is "one in which the denominator is also based on sales data." *Motion of Plaintiffs Koyo Seiko Company, Ltd. and Koyo Corporation of U.S.A. for Judgment on the Agency Record,* at 15–16.

Koyo, however, offers no support for this conclusion. The only provision cited by Koyo which refers to the actual assessment of antidumping duties is 19 U.S.C. § 1675(a)(1)(B) (1988 & 1992 Supp.), which provides that Commerce shall "review, and determine (in accordance with paragraph (2), the amount of any antidumping duty, * * *" Paragraph two further states that the amount by which foreign market value exceeds the U.S. price "shall be the basis for the assessment of antidumping duties on entries of the merchandise included within the determination * * *." 19 U.S.C. § 1675(a)(2) (1988 & 1992 Supp.).

Commerce did in fact calculate the dumping margins as the difference between foreign market value and the U.S. price, which was therefore the basis for the assessment of dumping duties. The entered value was used by Commerce only to allocate to each entry a portion of the antidumping duties due.

It is well-established that commerce is granted tremendous deference in selecting the appropriate methodology. *ICC Indus., Inc. v. United States,* 812 F.2d 694, 699 (Fed. Cir. 1987); *Consumer Prods. Div., SCM Corp. v. Silver Reed America, Inc.,* 753 F.2d 1033, 1039 (Fed. Cir. 1985). As long as Commerce's "decision is reasonable, then Commerce has acted within its authority even if another alternative is more reasonable." *See Koyo Seiko Co. v. United States,* 16 CIT ____, ____, Slip Op. 92–72 at 12 (1992); *see also Zenith Radio Corp. v. United States,* 9 CIT 110, 113 and n.9, 606 F. Supp. 695, 699 and n.9 (1985), *aff'd,* 783 F.2d 184 (Fed. Cir. 1986).

In this case Commerce's methodology is a reasonable means of achieving the end result and, therefore, Commerce's actions are justified and in accordance with law.

2. *Post-Sale Price Adjustments:*

In the final results, Koyo had two post-sale price adjustments to correct invoicing errors and retroactive price changes. First, Koyo argues that Commerce improperly classified these adjustments as "circumstance of sale" adjustments. Koyo claims that circumstance of sale adjustments are expenses that arise exclusively from preparing merchandise for sale and from selling activities themselves. Koyo cites *Smith-Corona Group v. United States,* 713 F.2d 1568, 1575 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984), for the premise that circumstance of sale adjustments need only have a reasonably direct relationship to the sales under consideration. *Id.* at 1580.

That same case recognized Commerce's broad authority to define "circumstance of sale." The Court of Appeals stated that:

> The statute does not expressly limit the exercise of [the Secretary's] authority to determine adjustments, nor does it include precise standards or guidelines to govern the exercise of that authority. Additionally, the statute does not define the term "circumstance of sale" nor does it prescribe any method for determining allowances. Congress has deferred to [the Secretary's] expertise in this matter.

Smith-Corona, 713 F.2d at 1575.

Thus, Commerce's decision to treat these adjustments as circumstances of sale was within its discretion and reasonable.

Secondly, Koyo claims that even if Commerce treats these adjustments as circumstances of sale, Commerce's treatment of Koyo's home market post-sale price adjustments as indirect expenses is contrary to law and unsupported by substantial evidence in the administrative record. Koyo adds that the adjustments should be characterized as direct selling expenses. Commerce claims that they are indirect expenses because Koyo did not allocate these adjustments on a product-specific basis.

Koyo again relies on *Smith-Corona,* 713 F.2d 1568, because the rebates involved in that case were considered direct selling expenses even though these were allocated on a non-product specific basis. The case at hand, however, can be differentiated in that the rebates in *Smith-Corona* were granted as a straight percentage of sales, regardless of the models sold. They did not vary from sale to sale and product to product as did the post-sale price adjustments at issue in this case. In *Smith-Corona* the rebates could be specifically correlated with direct merchandise using verified cost and sales information. This cannot be done in the case at hand and thus, Commerce was justified in treating the adjustments as indirect expenses.

3. *Home Market Sample Sales:*

Thirdly, Koyo claims that Commerce should have excluded Koyo's home market sample sales from its calculation of foreign market value ("FMV"). Koyo claims that these sample sales should have been excluded because only merchandise that is sold "in the usual commercial quantities" *and* in the "ordinary course of trade" to one or more purchasers may be used to determine FMV. 19 U.S.C. § 1677b (1988 & Supp. 1992); 19 C.F.R. § 353.46(a) (1991).

Koyo, however, has the burden of proving that its home market sample sales were not sold in the ordinary commercial quantities and in the ordinary course of trade and it has not done so in this case. Moreover, the administrative record in this case is lacking substantial evidence to prove otherwise. Thus, Commerce's decision to include these sample sales in its calculations of FMV was reasonable and in accordance with law.

4. *Arm's Length Sales:*

Koyo additionally claims that Commerce erred by not including sales to related parties when calculating FMV despite a showing by Koyo that these sales were made at arm's length.

Generally, if Commerce determines that prices are at arm's length, it accepts the prices to related parties and includes them in its calculation of FMV. *Final Determination of Sales at Less Than Fair Value; Brass Sheet and Strip From Sweden*, 52 Fed. Reg. 819, 820 (1987); *Frozen Concentrated Orange Juice From Brazil; Final Determination of Sales at Less Than Fair Value*, 52 Fed. Reg. 8,324, 8,328 (1987). These will be included, however, "only if [Commerce is] satisfied that the price is comparable to the price at which the producer or reseller sold such or similar merchandise to a person not related to the seller." 19 C.F.R. § 353.45(a).

Koyo has the burden of proving that the sales to related parties were at arm's length. The information provided by Koyo showed that some related party sales were made at prices which were higher than prices to unrelated customers, while others were made at lower prices. As Commerce indicated, "[t]he fact that some related party sales were made at arm's length is not an adequate basis to conclude that such sales were generally made at arm's length." *Final Results*, 56 Fed. Reg. at 31,746. Therefore, since Koyo has not satisfied the burden of proof, Commerce properly excluded Koyo's sales to its related parties from calculation of FMV.

5. *Direct Selling Expenses:*

Additionally, Koyo claims that Commerce's deduction of direct selling expenses from the exporter's sales price was contrary to law. They claim that Commerce should have added these direct selling expenses to FMV instead of deducting them from the exporter's sales price.

Commerce claims that Koyo is precluded from raising this argument *de novo* since they did not bring it up at the administrative level. It is well established that a "reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946); *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)

In this case, however, based on precedent, plaintiffs knew Commerce's position on this issue and deemed it futile for Koyo to raise this issue below. As a general rule, courts may "refuse to require administrative exhaustion when resort to the administrative remedy would be futile * * *." *See Asociacion Colombiana de Exportadores de Flores v. United States*, 916 F.2d 1571, 1575 (Fed. Cir. 1990) (quoting *Bendure v. United States*, 554 F.2d 427, 431 (Ct. Cl. 1977)); *see also Techsnabexport, Ltd. v. United States*, 16 CIT ____, ____, Slip Op. 92–82 at 13–14 (1992).

Thus, we turn to this issue on the merits. According to 19 U.S.C. § 1677a(e) (1988) "the exporter's sale price shall also be adjusted by be-

ing reduced by the amount, if any, of * * *; (2) expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise * * *."

The Court of Appeals, however, has interpreted section 1677a(e) to refer to indirect rather than direct selling expenses. *Consumer Prods. Div.*, 753 F.2d at 1036–38.

This court has consistently held that "direct selling expenses are properly characterized as differences in circumstances of sale giving rise to an adjustment of FMV." *NTN Bearing Corp. of America v. United States*, 14 CIT ____, ____, 747 F. Supp. 726, 739 (1990); *Consumer Prods. Div.*, 753 F.2d 1033; *The Timken Co. v. United States*, 11 CIT 786, 673 F. Supp. 495 (1987). In *NTN Bearing Corp.*, 14 CIT ____, 747 F. Supp. 726, the court refused to recognize Commerce's argument that direct selling expenses should be deducted from the exporter's sales price and remanded the case to Commerce to recalculate dumping margins to reflect an adjustment of foreign market value for direct selling expenses. This Court is of the same opinion and remands this case to Commerce to recalculate dumping margins to reflect an adjustment of FMV for direct selling expenses.

6. *Sales Across Different Levels of Trade:*

Finally, Koyo claims that Commerce's comparison of sales across different levels of trade was contrary to law and unsupported by substantial evidence.

In its Final Results, the ITA stated that

> we first sought contemporaneous sales of identical merchandise at the same level of trade in the home market as that of the U.S. sale. If we were unable to find a match, we then looked for contemporaneous sales of identical merchandise at the next level of trade. * * * If we were unable to find identical matches at the next level of trade, we then sought contemporaneous home market sales of the same family as the U.S. bearing at the same level of trade. If unsuccessful, we then sought contemporaneous home market sales of the same family at the next level of trade before using [constructed value] as the basis for FMV.

Final Results, 56 Fed. Reg. at 31,755–56.

On several occasions this Court has affirmed Commerce's selection of most similar merchandise sold in the home market when alternative levels were unavailable. *The Timken Co. v. United States*, 10 CIT 86, 630 F. Supp. 1327 (1986); *NTN Bearing Corp.*, 14 CIT at ____, 747 F. Supp. at 736. Likewise in this case, since alternate levels were unavailable, Commerce's selection of similar merchandise was reasonable and in accordance with law.

CONCLUSION

In accordance with the foregoing opinion, this case is remanded to the Department of Commerce, International Trade Administration, to recalculate dumping margins pursuant to the instructions set forth in this

opinion to reflect an adjustment of the foreign market value for direct selling expenses. Commerce's determination is affirmed in all other respects. Commerce shall report the results of the remand determination to this Court within forty-five (45) days of the date this opinion is entered.

(Slip Op. 92–100)

ALLIED INTERNATIONAL, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 90–05–00231

OPINION

Appearances:
Glad & Ferguson (*Edward N. Glad*, Esq.) for plaintiff.
Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Mark S. Sochaczewsky*, Esq.) for defendant.

(Decided July 1, 1992)

INTRODUCTION

NEWMAN, *Senior Judge:* This action, reassigned to the writer on April 28, 1992, involves a question of novel impression in the administration of the transaction value statute, 19 U.S.C. § 1401a(b).

Specifically, the issue posed is: In determining transaction value did Customs properly disregard the importer's purchase bonus which was contingent or conditional on certain quantity deliveries and payment of the purchase price in 1988 under a preimportation agreement with the exporter, absent proof that such contingencies had actually occurred prior to the date of entry. The court holds in the affirmative.

In this action, Allied International ("Allied") challenges the appraised transaction value determined by the Customs Service ("Customs") in liquidation of certain entries of hardboard exported from the former Union of Soviet Socialist Republics and entered at the port of Boston on January 9, 1989. Allied's administrative protest against the appraisement was denied in conformance with 19 U.S.C. § 1515 and the court's jurisdiction is predicated on 28 U.S.C. § 1581(a). This action is currently before the court on Allied's motion for summary judgment pursuant to CIT Rule 56, and defendant's request that the court treat its opposition as a cross-motion for summary judgment.

At the outset, the parties agree that the subject merchandise was correctly appraised on the basis of transaction value. Plaintiff claims, however, that Customs' appraisal at the invoiced unit values less ocean freight and insurance should properly have also excluded a 2.5% price

bonus or discount from the contract price. Allied maintains that by virtue of an addendum to its contract with the Soviet exporter entered into *prior* to the subject importation, the 2.5% price bonus was expressly payable after the delivery and payment for 7,850,000 square meters of the merchandise sold and agreed to be shipped during 1988. According to plaintiff, there is no genuine issue of fact that the preimportation agreement with the exporter provided for the bonus and the contract was performed. Consequently, argues plaintiff, as a matter of law, in determining transaction value such bonus should have been deducted from the purchase price and not disregarded by Customs under § 1401a(b)(4)(B).

In response, defendant concedes the preimportation agreement for the bonus asserted by Allied, but insists that Allied's legal conclusion that the bonus should have been deducted is erroneous. Defendant maintains that Allied's motion fails to address certain additional material facts relating to deductibility of the bonus: (1) whether, as of January 9, 1989 (date of entry), the quantity of merchandise necessary for the 2.5% bonus to apply had actually been previously imported, delivered and paid for; and (2) whether, as of the date of entry, the bonus was actually paid by the exporter to the importer.

Defendant asserts that, as matter of law, absent the foregoing showing by plaintiff, the alleged contingent bonus was properly disregarded by Customs in determining transaction value as a post importation "rebate of, or other decrease in, the price actually paid or payable" within the purview of 19 U.S.C. § 1401(b)(4)(B). The undisputed material facts relied on by Allied in support of the current motion are, according to defendant, insufficient to make a *prima facie* case for deductibility of the bonus. Further, defendant argues that in response to notice of its request to have its opposition to plaintiff's motion treated as a cross-motion for summary judgment, Allied failed to dispute the additional facts that are urged by defendant as material to the issue of the bonus' deductibility, and that Allied has failed to rebut the legal presumption of correctness attaching to Customs' appraisal.

In view of authority vesting a district court with "power to enter summary judgment *sua sponte*, so long as the losing party was on notice that [it] had to come forward with all of [its] evidence," *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (citations omitted), this court, having all the remedial powers of a district court, will in the exercise of its discretion accommodate defendant's procedural request. For the reasons stated below, defendant's cross-motion for summary judgment is granted.

DISCUSSION

The Relevant Statute:

19 U.S.C. § 1401a(b)(4)(B), provides:

> Any rebate of, or other decrease in, the price actually paid or payable that is *made or otherwise effected* between the buyer and seller

> *after the date of importation* of the merchandise into the United States shall be disregarded in determining the transaction value under paragraph [(b)] (1) [emphasis supplied].

Fundamentally, "[t]he starting point in every case involving construction of a statute is the language itself." *Madison Galleries, Ltd. v. United States,* 870 F.2d 627, 629 (Fed. Cir. 1989) (citations omitted). More, the plain language of the statute is deemed controlling unless a "clear cut contrary legislative intent" dictates otherwise. *Id.* at 630 (citations omitted).

Simply stated, the court finds the language of § 1401a(b)(4)(B) to be unambiguous. There is nothing which may be gleaned from either the straightforward text or the pertinent legislative history that warrants interpretation of this statutory provision under the circumstances presented here other than by its plain meaning. *See* 1979 U.S. Code Cong. and Adm. News, p. 500–501.

Summary Judgment:

The initial duty of production cast upon the moving party at the summary judgment stage, who also carries the ultimate burden of persuasion at trial, has been clarified in accordance with a recent line of Supreme Court case law. *See e.g., Celotex Corp.,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986).

As to a motion for summary judgment itself, the moving party bears the primary responsibility of demonstrating to the court that no genuine dispute exists as to any material fact. *Celotex,* 477 U.S. at 323. *See Matsushita Electric,* 475 U.S. at 585–86. Importantly, it is clear that in deciding a motion for summary judgment, "the judge's function is not himself to *weigh* the [factual] evidence and determine the truth of the matter but to determine whether there is a genuine [material] issue for trial." *Anderson,* 477 U.S. at 249. Moreover, "the materiality determination rests on the substantive law, [and] it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." *Id.* at 248.

Indeed, in addressing whether a fact is "material" to the dispute, the following authoritative analysis merits quotation:

> [A] fact is material if it tends to resolve any of the issues that have been properly raised by the parties. Consequently, in ruling on motions for summary judgment federal courts have held that a fact or facts are material if they constitute a legal defense or if their existence or nonexistence might affect the result of the action, or if the resolution of the issue they raise is so essential that the party against whom it is decided cannot prevail.

10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2725 at 93–95 (2d ed.1983) [citations omitted].

Although Allied's current effort to seek relief on its claim is in a summary judgment format under Rule 56, Allied nonetheless must establish the same essential elements of its case that it would be required to prove

at trial with respect to overcoming a motion for directed verdict under Rule 50(a) of the Federal Rules of Civil Procedure. *Celotex*, 477 U.S. at 323; *Anderson*, 477 U.S. at 250. As would be the case at trial, Allied in moving for summary judgment bears the ultimate burden of persuasion concerning all elements of its asserted claim for deductibility of the bonus which the court determines to be material in proving a *prima facie* case. Thus, even if all of the material facts asserted by and relied on by Allied are conceded by defendant, but those facts standing alone, as a matter of law, fail to establish a *prima facie* case for plaintiff's claim, motion for summary judgment must be denied.

Additionally, defendant strenuously urges that the undisputed material facts relied on by Allied in support of its present motion must, if they were established at a trial, be sufficient to overcome the statutory presumption of correctness attaching to Customs' appraisal. *See* 28 U.S.C. § 2639(a)(1); *Moss Manufacturing Co., Inc. v. United States*, 13 CIT 420, 714 F. Supp. 1223, 1227 (1989), *aff'd*, 896 F.2d 535 (1990); *Jimlar Corp. and Algesco, Ltd. v. United States*, 11 CIT 501 (1987), *aff'd*, 846 F.2d 748 (1988). *See also United States v. Arnold Pickle and Olive Co.*, 68 CCPA 85, C.A.D. 1270, 659 F.2d 1049 (1981). And defendant points up that, as a matter of law, Customs is presumed to have found the existence of every fact necessary to support its appraisement. *White Lamb Finlay, Inc. v. United States*, 29 CCPA 199, C.A.D. 192 (1942); *Glenside Steel Co. et al. v. United States*, 71 Cust. Ct. 23, C.D. 4466, 364 F. Supp. 1398 (1973), *aff'd*, 62 CCPA 1, C.A.D. 1133, 503 F.2d 563 (1974)).

As explained *infra*, the court concludes that denial of Allied's motion rests solely on its failure to establish that all of its asserted undisputed material facts would, as a matter of law, suffice to sustain Allied's burden of proof on its claim.

Correspondingly, and irrespective of defendant's heavy reliance on the statutory presumption of correctness, the court sustains defendant's cross-motion based upon plaintiff's utter failure to dispute or place in issue the additional undisputed material facts urged by defendant in requesting its cross-motion—nondelivery of the stipulated quantity and nonpayment of the full purchase price prior to entry—that, as a matter of law, negate deductibility of the bonus in determining the transaction value.

The Parties' Motions:

The pertinent addendum under the contract between Allied and the Soviet exporter contemplated the following agreement:

> After *delivery and payment* of about 7.850.000 [in original] square meters of Hardboard sold and provided for shipment *during 1988* under the above Contract the Sellers will pay to the buyers a bonus at the rate of 2,5% [in original] of the value of the above shipped goods [emphasis supplied].

Under the plain meaning of § 1401a(b)(4)(B), the operative text "made or otherwise effected," as it applies to rebates or other decreases affecting price, necessarily contemplates an affirmative showing by the

importer of the occurrence *on or before the date of entry* of all contingencies or conditions upon which rests the seller's obligation to pay and the purchaser's right to receive a rebate or other post-purchase decrease in the price: in this case, "delivery and payment of about 7.850.000 square meters of Hardboard sold and provided for shipment during 1988 * * *."

In support of its motion, Allied has submitted an affidavit executed by Morton S. Wolfogel, co-founder, co-owner, and treasurer of Allied ("Wolfogel") establishing that the preimportation purchase contract, personally negotiated by him with the Soviet exporter, was fully complied with by Allied and that the 2.5% price bonus was paid in full to Allied. More, Allied proffers a telex dated April 13, 1989 purporting to show that the said quantity deliveries were made, and that credit to Allied for the 2.5% price bonus was acknowledged by the Soviet exporter.

Without disputing the foregoing material facts, defendant raises the point that the establishment of such facts alone under plaintiff's moving papers leave unaddressed the critical event required to trigger a *deductible* bonus, *i.e.*, the contract's contingencies relating to quantity deliveries and payment of the purchase price *in fact transpired by January 9, 1989, the date of entry of this merchandise.*

The court fully agrees with defendant's argument. In order for Allied to have made a case for summary judgment regarding a reduction in the transaction value for the contingent or conditional 2.5% price bonus, the court holds it was incumbent upon Allied to affirmatively show more than that there was a preimportation agreement for the bonus, that the contract was completed by Allied and that the bonus was paid. Additionally, Allied was required to show that there was no genuine issue or dispute with regard to the occurrence of these contingencies of quantity deliveries and payment prior to the date of entry. Allied's failure to make this critical showing is deemed fatal to Allied's efforts to obtain a summary judgment.

Similarly, Allied's failure after it was on notice as to defendant's requested cross-motion for summary judgment, to controvert defendant's assertion that there was no genuine issue as to any material fact, including nonperformance of the contingencies for quantity deliveries and payment by the date of entry, plainly signifies to the court that there is no genuine issue for trial.

As a matter of law, the court holds that defendant is entitled to its requested cross-motion for summary judgment affirming the appraisement and dismissing the action.

Allied's motion for summary judgment is thus denied, and defendant's cross-motion for summary judgment is granted. Hence, this action is dismissed and judgment will be entered accordingly.

(Slip Op. 92–101)

MINEBEA CO., LTD. AND NMB CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, TORRINGTON CO., DEFENDANT-INTERVENOR

Court No. 89–06–003445

Plaintiffs move pursuant to Rule 56.1 for judgment on the agency record alleging that the United States International Trade Commission ("ITC") has the authority to terminate an antidumping duty investigation on spherical plain bearings on the ground that the petitioner did not have standing to file "on behalf of [the U.S. domestic] industry," or in the alternative, that the ITC's finding that the U.S. spherical plain bearings industry was injured by reason of imports was not in accordance with law.

Held: The ITC has no authority to determine whether a petitioner has standing to file a petition requesting an antidumping duty investigation "on behalf of an industry," and the ITC's finding of material injury to the U.S. spherical plain bearings industry was in accordance with law.

[Plaintiffs' motion for judgment on the agency record is denied; action is dismissed.]

(Dated July 6, 1992)

Tanaka Ritger & Middleton (*H. William Tanaka, Michele N. Tanaka* and *Michael J. Brown*) for plaintiffs.

James A. Toupin, Assistant General Counsel, *Stephen A. McLaughlin* and *Francis Marshall*, Attorney-Advisors, United States International Trade Commission, for defendant.

Stewart & Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.* and *David Scott Nance*) for defendant-intervenor.

OPINION

TSOUCALAS, *Judge:* Plaintiffs, Minebea Co., Ltd. and NMB Corporation ("Minebea"), move pursuant to Rule 56.1 of the rules of this Court for judgment on the agency record in regard to the United States International Trade Commission's ("ITC") final determination that the U.S. spherical plain bearings industry has been injured by less than fair value ("LTFV") imports of bearings from Japan. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From The Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom*, 54 Fed. Reg. 21,488 (1989); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From The Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom* ("ITC Final Determination"), Inv. Nos. 303–TA–19–20 (Final), Inv. Nos. 731–TA–391–399 (Final), USITC Pub. 2185 (May 1989).

Minebea alleges that defendant-intervenor The Torrington Company ("Torrington"), petitioner in the underlying antidumping duty proceeding, did not have the support of the major portion of the U.S. spherical plain bearings industry. Therefore, Minebea alleges that Torrington had no standing to file an antidumping duty petition "on behalf of an industry" as required by 19 U.S.C. § 1673a(b) (1988) which states in pertinent part:

(b) Initiation by petition

(1) Petition requirements

An antidumping proceeding shall be commenced whenever an in-

terested party * * * files a petition with the administering authority, on behalf of an industry, which alleges the elements necessary for the imposition of the duty imposed by section 1673 of this title, * * *

(2) Simultaneous filing with Commission

The petitioner shall file a copy of the petition with the Commission on the same day as it is filed with the administering authority.

Minebea argues that the ITC has authority to terminate an antidumping duty investigation on the ground that the petitioner has no standing to file a petition and that its failure to do so is reversible error. *Memorandum on behalf of the Minebea Companies in support of motion for judgment upon the agency record* ("Minebea Memorandum") at 14–30. Alternatively, Minebea argues that the ITC's determination that the U.S. spherical plain bearings industry was injured by reason of LTFV imports from Japan was not in accordance with law because a majority of the U.S. spherical plain bearings industry opposed the investigation and attributed any injury suffered by themselves to factors other than imports from Japan. *Minebea Memorandum* at 30–31.

The Court's jurisdiction is based on 28 U.S.C. § 1581(c) (1988).

BACKGROUND

On March 31, 1988, Torrington filed an antidumping duty petition with the Department of Commerce, International Trade Administration ("ITA"), and with the ITC alleging that it was an interested party[1] and that the petition was filed on behalf of the U.S. domestic antifriction bearings industry.[2] Administrative Record ("AR") Pub. Doc. 1. Torrington alleged in its petition that there was one antifriction bearings industry and one class or kind of merchandise covered by its petition. *Id.* On July 13, 1988, the ITA determined that antifriction bearings comprise five classes or kinds of merchandise, one of which was spherical plain bearings.[3]

Domestic producers of the five classes or kinds of antifriction bearings emerged to either support or oppose the petition. In regard to spherical plain bearings, New Hampshire Ball Bearings, Inc. ("NHBB"), a sub-

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[1] The term interested party is defined at 19 U.S.C. § 1677(9) (1988) which states in pertinent part:

(9) Interested Party

The term "interested party" means –

* * * * * * *

(C) a manufacturer, producer, or wholesaler in the United States of a like product,

* * * * * * *

The term like product is defined at 19 U.S.C. § 1677(10) (1988):

(10) Like Product

The term "like product" means a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this subtitle.

[2] Industry is defined at 19 U.S.C. § 1677(4) (1988):

(4) Industry

(A) In General

The term "industry" means the domestic producers as a whole of a like product * * *.

[3] The ITA's determination that antifriction bearings comprise five classes or kinds of merchandise was affirmed by this Court in *The Torrington Co. v. United States*, 14 CIT ___, 745 F. Supp. 718 (1990), *aff'd*, 938 F.2d 1276 (Fed. Cir. 1991).

sidiary of Minebea, was found to be the only U.S. producer other than Torrington and opposed Torrington's petition. AR Pub. Doc. 656.

In its final determination, the ITA found that opponents of the petition did not represent a majority of any of the domestic industries, that Torrington had filed a facially sufficient petition, and that therefore Torrington had standing to file an antidumping duty petition with respect to each of the five classes or kinds of antifriction bearings, including spherical plain bearings. *Final Determinations of Sales at Less than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany*, 54 Fed. Reg. 18,992, 19,006 (1989). This Court explicitly affirmed the ITA's standing determination in regard to the U.S. spherical plain bearings industry in *Minebea Co. v. United States*, 16 CIT ____, ____, 782 F. Supp. 117, 119–20 (1992).

Although requested to do so, the ITC refused to terminate its investigation due to a lack of standing by Torrington to file a petition in regard to spherical plain bearings. Vice Chairman Ronald A. Cass was the only Commissioner to address the standing issue stating that "[i]n the interests of comity, I have concluded that it may be inappropriate for the Commission to pass on standing issues in investigations where Commerce has already considered and resolved the question." ITC Final Determination at 123.

Upon considering the administrative record before it, the ITC determined that LTFV imports of spherical plain bearings from Japan were causing material injury to the U.S. industry. ITC Final Determination at 4.

Discussion

A determination by the ITC will be affirmed unless that determination is not supported by substantial evidence or is otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States*, 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988) (citations omitted).

1. *Standing:*

This Court has affirmed Torrington's standing to file an antidumping duty petition in regard to antifriction bearings on numerous occasions. *NTN Bearing Corp. of America v. United States*, 15 CIT ____, ____, 757 F. Supp. 1425, 1427–31 (1991); *SKF USA, Inc. v. United States Dep't of Commerce*, 15 CIT ____, ____, 762 F. Supp. 344, 346–48 (1991); *Koyo Seiko Co. v. United States*, 15 CIT ____, ____, 768 F. Supp. 832, 836–37 (1991). In addition, this Court has *explicitly affirmed* Torrington's standing to file an antidumping duty petition on behalf of the U.S. spherical plain bearings industry. *Minebea Co. v. United States*, 16 CIT ____, ____, 782 F. Supp. 117, 119–20 (1992).

This Court stated in *NTN* that "[i]t is the function of the *ITA* to determine standing and no statute or regulation requires the ITA to defer to data used by the ITC." *NTN*, 15 CIT at ____, 757 F. Supp. at 1430 (emphasis in original); *see also Minebea*, 16 CIT at ____, 782 F. Supp. at 120.

The ITC itself has taken the position that it does not have statutory authority to determine a petitioner's standing. *Grey Portland Cement And Cement Clinker From Japan*, Inv. No. 731–TA–461 (Final), USITC Pub. 2376 at 3–13, 45–46 (April 1991); *Silicon Metal From The People's Republic Of China*, Inv. No. 731–TA–472 (Final), USITC Pub. 2385 at 5 n.1 (June 1991).

Recently the United States Court of Appeals for the Federal Circuit addressed the issue of the standing of a petitioner in an antidumping duty investigation to file on behalf of an industry. *Suramerica de Aleaciones Laminadas, C.A. v. United States*, ____ F.2d ____, Nos. 91–1015, –1050, –1055 (Fed. Cir. June 11, 1992). In its opinion the Court lends support for the proposition that questions of the standing of a petitioner to file an antidumping duty petition are to be decided by the ITA alone stating that:

> Although both Commerce and the ITC are "charged" with administering different parts of the Act, it is Commerce who determines that a petition is sufficient to cause the initiation of investigations – that the statutory requirements are satisfied. *The ITC's position in its brief is that it defers to Commerce's initial determination, and that only Commerce can review that determination. This is a reasonable and permissible interpretation of the Act's delineation of respective responsibilities,*

Id. at 12 n.6 (emphasis added).

Therefore, this Court finds that it is the ITA's sole responsibility to determine the standing of a petitioner to file a petition requesting the imposition of antidumping duties "on behalf of an industry." The ITC correctly defers to the ITA's decision on this issue. The Court adheres to its opinion in *Minebea* and finds that Torrington had standing to file an antidumping duty petition on behalf of the U.S. spherical plain bearings industry. *Minebea*, 16 CIT at ____, 782 F. Supp. at 120.

2. *ITC's Injury Determination:*

Minebea argues that NHBB accounted for more than half of the U.S. spherical plain bearings industry during the period of investigation and that NHBB took the position that any injury or difficulty it was experiencing was not a result of LTFV imports. Therefore, Minebea argues that the ITC's finding that LTFV imports have caused injury to the U.S. spherical plain bearings industry was not in accordance with law. *Minebea Memorandum* at 30–31. Minebea does not challenge the ITC's determination on the basis that it is not supported by substantial evidence.

Minebea cites no statute or cases which support its position that there can be no finding of material injury if a majority of the U.S. industry believes that its problems are not caused by LTFV imports. In fact, when

the ITC is determining whether LTFV imports are a cause of material injury suffered by a U.S. industry, the position of any segment of the U.S. industry as to the cause of its difficulties is not something which the ITC is required to consider. 19 U.S.C. § 1677(7) (1988). The ITC is required to evaluate the condition of the industry as a whole when determining whether LTFV imports are a cause of material injury to the U.S. industry. *Calabrain Corp. v. United States Int'l Trade Comm'n,* 16 CIT ___, ___, Slip Op. 92–69 at 18 (May 13, 1992) (quoting *Copperweld Corp. v. United States,* 12 CIT 148, 165–66, 682 F. Supp. 552, 569 (1988)); *Metallverken Nederland B.V. v. United States,* 13 CIT 1013, 1020, 728 F. Supp. 730, 736 (1989); *Sandvik AB v. United States,* 13 CIT 738, 745–46, 721 F. Supp. 1322, 1330 (1989), *aff'd,* 904 F.2d 46 (Fed. Cir. 1990). That is precisely what it did here. ITC Final Determination at 57–58, 71–72.

CONCLUSION

This Court finds that it is the responsibility of the ITA to determine the standing of a petitioner to file a petition "on behalf of an industry" requesting the imposition of antidumping duties. The ITC's decision to defer to the ITA's decision on this issue was in accordance with law and is affirmed. The Court also finds that the ITC's determination that the U.S. spherical plain bearings industry was materially injured by LTFV imports from Japan was in accordance with law and is affirmed. Therefore, this case is dismissed.

(Slip Op. 92–102)

BELTON INDUSTRIES, INC., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND GOVERNMENT OF COLOMBIA, ROYAL THAI GOVERNMENT, DEFENDANT-INTERVENORS

Consolidated Court No. 90–09–00474

[Immediately following a July 2, 1992 hearing on separate orders to show cause why the Governments of Sri Lanka and Peru should not be allowed to intervene post-judgment in this action, the Court denied the respective motions to intervene without prejudice to the proposed intervenors to make application to the Court of Appeals for the Federal Circuit for similar relief; all other applications in connection with the motions to intervene, including proposed intervenors' motions to extend the time to file a Notice of Appeal and Sri Lanka's Rule 60(b) motion for relief from judgment, were denied as moot. This slip opinion reflects those rulings.

(Dated July 7, 1992)

Wilmer, Cutler, & Pickering (*Ronald I. Meltzer*), for Plaintiffs.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Vanessa P. Sciarra*, and *John Mahon*, on the motion), for Defendant.

Willkie, Farr & Gallagher (*Daniel L. Porter*), for Defendant-Intervenor Royal Thai Government.

Mudge, Rose, Guthrie, Alexander & Ferdon (*Michael P. Daniels*, and *Gregory J. Spak*), for Defendant-Intervenor Government of Columbia and proposed Defendant-Intervenor Government of Sri Lanka.

Prather Seeger, Doolittle & Farmer (*Gary M. Welsh*), for proposed Defendant-Intervenor Government of Peru.

MEMORANDUM OPINION

CARMAN, *Judge:* This case was originally decided on the merits on March 24, 1992, Slip Op. 92–39, and a final judgment order was issued on May 7, 1992, Slip Op. 92–64.

On June 30, 1992, pursuant to USCIT Rule 7(e), the Government of Sri Lanka brought an order to show cause why the Court should not grant its motion to intervene post-judgment as of right; on July 1, 1992, the Government of Peru brought an order to show cause also seeking to intervene post-judgment as of right (the Governments of Sri Lanka and Peru will be collectively referred to as "proposed intervenors"). *See* USCIT Rule 24(a)(1) & (2). Proposed intervenor Peru's sole stated purpose for its motion to intervene was to file a Notice of Appeal of this Court's final judgment in this action, *Belton Indus., Inc. v. United States*, Slip Op. 92–64 (May 7, 1992). Proposed intervenor Sri Lanka stated that its motion for intervention was either for the purpose of appeal or for the purpose of filing a motion for relief from the judgment under USCIT Rule 60(b). Both proposed intervenors argued that because the Defendant United States considered it unlikely that it would file a Notice of Appeal, proposed intervenors believed their interests were no longer adequately represented. *See* USCIT Rule 24(a)(2).[1]

The Court signed the respective orders to show cause on July 1, 1992, and the matters were heard on July 2, 1992. Participating at the hearing were counsel for the Royal Thai Government, the Governments of Columbia and Sri Lanka, the Government of Peru, Plaintiff Belton, and Defendant United States. While the United States and the Government of Columbia took no position regarding the motions to intervene, the Royal Thai Government and Plaintiff Belton expressed opposition to the motions.

This Court denied proposed defendant-intervenors' motions to intervene in open court on July 2, 1992, as well as all other motions filed in connection therewith. This slip opinion reflects those rulings.

BACKGROUND

On March 24, 1992 this Court granted Plaintiff Belton's Rule 56.1 motion for judgment upon the agency record, holding that the United States Department of Commerce ("Commerce") failed to provide proper written notice to the petitioners (domestic interested parties) prior to revoking certain countervailing duty orders and terminating certain

[1] The record reflects that on July 6, 1992, Defendant United States filed a Notice of Appeal. That action took place subsequent to the hearing and this Court's ruling dated July 2, 1992, and therefore has no bearing on the Court's findings.

suspended investigations concerning textile products and apparel from Argentina, Columbia, Peru, Sri Lanka, and Thailand, as required by 19 C.F.R. § 355.24(d)(4) (1990).[2] *See* Slip Op. 92–39 at 13. The Court also found that even if it could be successfully argued that Commerce provided proper notice to the petitioners in some instances, nevertheless, Commerce should have accepted petitioners' objection letters as timely. *Id.* at 13–14. The Court remanded the proceedings to Commerce with the direction to rescind the revocation and termination orders and report such action to the Court within 30 days. *Id.* at 17.

On April 16, 1992, the Defendant filed a motion to clarify the Court's March 24, 1992 order accompanying Slip Op. 92–39. After all parties were given an opportunity to be heard and upon their application, this Court, in Slip Op. 92–64 (May 7, 1992), vacated its order accompanying Slip Op. 92–39 and ordered Commerce, without a remand, to rescind the revocation and termination orders that were the subject of this action and to "reinstate in full force the pre-existing countervailing duty orders and suspended investigations which were the subject of the revocation and termination orders." Slip Op. 92–64.

On June 26, 1992, Defendant-Intervenor Royal Thai Government filed a timely Notice of Appeal for the purposes of appealing this Court's May 7, 1992 final judgment and order. The Notice stated that the Royal Thai Government appeals only those aspects of the final judgment and order that concern Commerce's determination concerning Thailand. The time to appeal this Court's May 7, 1992 order expired on July 6, 1992. As of the return date of the order to show cause, July 2, 1992, no other party besides the Royal Thai Government had filed a Notice of Appeal.

Jurisdiction and Post-Judgment Intervention

The first issue that the Court resolved was whether it retained jurisdiction to grant a post-judgment motion to intervene after a Notice of Appeal had been filed. Because of the facts of this case and the reasons set forth below, this Court declined to take jurisdiction.

Citing *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395 n.16 (1977) and *Halderman v. Pennhurst State School & Hospital*, 612 F.2d 131, 134 (3d Cir. 1979), the proposed intervenors argued that the Royal Thai Government's filing of a Notice of Appeal, which is apparently directed only to Commerce's determination concerning Thailand, does not end this Court's authority to consider motions to intervene by proposed intervenors Peru and Sri Lanka for the purpose of appealing

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[2] The revocation and termination orders that are the subject of this action are *Certain Textile Mill Products from Argentina; Revocation of Countervailing Duty Order*, 55 Fed. Reg. 32,940 (1990); *Certain Textile Mill Products and Apparel from Columbia; Termination of Suspended Countervailing Duty Investigations*, 55 Fed. Reg. 32,940 (1990); *Certain Textile Mill Products and Apparel from Peru; Revocation of Countervailing Duty Orders*, 55 Fed. Reg. 32,941 (1990); *Certain Textile Mill Products and Apparel from Sri Lanka; Revocation of Countervailing Duty Orders*, 55 Fed. Reg. 32,942 (1990); and *Certain Textile Mill Products from Thailand; Termination of Suspended Countervailing Investigation (in Part)*, 55 Fed. Reg. 48,885 (1990).

Commerce's determinations affecting Peru and Sri Lanka, assuming that those Notices of Appeal are timely.[3]

Proposed intervenors read *Halderman* and *McDonald* far too broadly. The Court of Appeals for the Third Circuit in *Halderman* reviewed an order of the district court which denied a post-judgment motion to intervene that was filed after a Notice of Appeal had been filed by one of the defendants. The *Halderman* court recognized that intervention after a final judgment was "an extreme example of untimeliness." *Halderman,* 612 F.2d at 134. The *Halderman* court stated, however, that the Supreme Court in *McDonald* permitted a post-judgment motion to intervene that was filed for the purpose of obtaining appellate review of a district court order denying class certification:

> The Supreme Court has recognized, however, that where the purpose of a motion to intervene is to obtain appellate review of a district court order determining the status of a class, the motion may be considered timely if filed within the time limit for filing a notice of appeal * * *. [M]oreover, in approving the opinion in *American Brake Shoe & Foundry Co. v. Interborough R.T. Co.,* 3 F.R.D. 162 (S.D.N.Y. 1942), the *McDonald* court tacitly rejected the district court's view that once a notice of appeal had been filed the court lost authority to consider the motion to intervene. 432 U.S. at 395 n.16, 97 S.Ct. 2464. Thus the trial court should have considered the merits of the motion to intervene for the purposes of appealing.

Halderman, 612 F.2d at 134.[4] This Court notes that in the *American Brake Shoe* decision, cited above, although a Notice of Appeal was filed by another party, that appeal was *abandoned* prior to the motion to intervene by the proposed intervenor. *American Brake Shoe* 3 F.R.D. at 164; *See McDonald,* 432 U.S. at 395 n.16.

In any event, the instant case does not involve the particularities and complexities associated with certification in class action suits, such as those in *McDonald* and *Halderman. See, e.g., McDonald,* 432 U.S. at 388–90.

There is, on the other hand, authority which holds that a trial court is without jurisdiction to permit post-judgment intervention after an appeal has been taken, except in the aid of an appeal. In *Nicol v. Gulf Fleet Supply Vessels,* 743 F.2d 298, 299 (5th Cir. 1984), the Fifth Circuit held that "[i]f an appeal is taken from a judgment which determines the entire action, the district court loses power to take any further action in the proceeding upon the filing of a timely and effective notice of appeal, except in aid of the appeal or to correct clerical errors under Rule 60(a)." *See also Thwaites Place Assoc. v. Secretary of the United States Dept. of*

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[3] Together with their orders to show cause and the motions to intervene, proposed intervenors filed motions for extensions of time to file a Notice of Appeal. Also, proposed intervenor Sri Lanka moved under Rule 60(b) for relief from the judgment. These motions were denied by this Court as moot on July 2, 1992.

[4] The *Halderman* court nevertheless affirmed the district court's dismissal of the motion to intervene as harmless error because the position the other appellants took in their appeals adequately represented the interests of the proposed intervenors. *Halderman,* 612 F.2d at 134.

Housing and Urban Development, 112 F.R.D. 189, 190 (S.D.N.Y. 1986); 3B Moore's Federal Practice paragraph 24.13 at 137, 141.

This Court's final judgment on May 7, 1992, disposed of the entire action, and the Royal Thai Government filed a Notice of Appeal–the only party in this action to do so. Upon the filing of a Notice of Appeal by a party, this Court's jurisdiction to consider matters concerning appeals from its final judgment becomes tenuous at best. In this Court's opinion, the case is now before the Court of Appeals and within its jurisdiction.

This Court indicated at the July 2 hearing that its denial of proposed intervenors' applications to intervene was made without prejudice to any further application that might be made to the Court of Appeals for the Federal Circuit for similar relief as seemed just and proper to the movants.

MOTIONS TO INTERVENE AS OF RIGHT

This Court ruled that even if it did have jurisdiction over the matter, it would deny the motions as untimely.

Proposed intervenors seek post-judgment intervention as of right under USCIT Rule 24(a)(1), alleging that they are "interested" parties within the meaning of 28 U.S.C. § 2631(j)(1) (1988), and that their applications to intervene for the purposes of filing an appeal are "timely". Alternatively, the proposed intervenors seek relief under Rule 24(a)(2), on the grounds that the United States, because it has apparently chosen not to appeal the final judgment, no longer adequately represents their interests as it allegedly did prior to the entry of judgment on May 7, 1992.

1. *Statutory Right to Intervene Necessary:*

In order to intervene pursuant to Rule 24(a)(1), the movant must have a statutory right so to do. USCIT Rule 24(a)(1). In actions under section 515A of the Tariff Act of 1930, only movants who are "interested parties" within the meaning of 28 U.S.C. § 2631(j)(1)(B) (1988) may intervene in an action pending in this Court. Because the proposed intervenors are governments of countries in which the merchandise in the case is produced or manufactured and those governments participated in the proceedings below, the proposed intervenors are clearly interested parties. *See* 19 U.S.C. § 1677(9)(B) (1988); 19 C.F.R. § 355.2(1) (1991). However, while proposed intervenors were statutorily eligible for intervention, that statutory right had to be exercised in a timely manner. *See Sumitomo Metal Indus. v. Babcock & Wilcox Co.,* 69 CCPA 75, 82, 669 F.2d 703, 708 (1982).

2. *Factors Affecting Timeliness of Motions to Intervene:*

It has been held that "post-judgment intervention is generally disfavored because it fosters delay and prejudice to existing parties." *Farmland Dairies v. Comm'r,* 847 F.2d 1038, 1044 (2d Cir. 1988) (citation omitted). However, applications for post-judgment intervention are not untimely per se. This Court has discretion in determining whether a

motion to intervene post-judgment is timely. *See Sumitomo*, 69 CCPA at 81, 669 F.2d at 707 (quoting *NAACP v. New York*, 413 U.S. 345, 366 (1973)); *United States v. American Telephone and Telegraph Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980).

In *Sumitomo*, the Court of Customs and Patent Appeals (the predecessor to the Court of Appeals for the Federal Circuit) set forth the following factors to be weighed in determining the timeliness of such motions:

> (1) the length of time during which the would-be intervenor actually knew or reasonably should have known of his right to intervene in the case before he applied to intervene;
> (2) whether the prejudice to the rights of existing parties by allowing intervention outweighs the prejudice to the would-be intervenor by denying intervention;
> (3) existence of unusual circumstances militating either for or against a determination that the application is timely.

Sumitomo, 69 CCPA at 81, 669 F.2d at 707 (footnotes omitted).

At the July 2 hearing upon the return of the orders to show cause and after reviewing all submissions and arguments of counsel on the motions to intervene, the Court made the following findings of fact and conclusions of law, as supplemented by this opinion.

1. The United States government as of the time of the hearing, July 2, 1992, had not decided if it would appeal the matter, stating that it would so decide by the last date it is eligible to do so, on July 6, 1992.

2. The proposed intervenors admit that they were aware of their statutory right to intervene since at least September 1990, when the action was commenced. Moreover, they were involved administratively in the action from before that time. Although a decision was made in this case on the merits on March 24, 1992, proposed intervenors took no action towards intervention then or anytime afterwards until the instant motions were filed at this late date.

3. The Governments of Peru and Sri Lanka knew or should have known of the progress of the proceedings and how the United States and others were presenting the issues. The Court notes that with respect to Sri Lanka's Rule 60(b) motion concerning the affect of this Court's final judgment on apparel products, proposed intervenor was aware or should have been aware that the United States did not fully represent their interests after the United States did not brief this issue.[5]

4. Furthermore on May 7, 1992, upon the motion of the United States and upon application of all the parties, this Court vacated its March 24, 1992 order attached to Slip Op. 92–39 and entered a new order and final judgment which directed Commerce to rescind its revocation and termination orders without a remand. Proposed intervenors have represented that were aware of the adverse May 7, 1992 final judgment, but

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[5] The Court notes that the apparel issue was briefly addressed in the Government of Columbia's response to Plaintiff's Rule 56.1 motion. Counsel for the Government of Peru has disavowed any interest in the relief sought in Sri Lanka's Rule 60(b) motion.

nevertheless waited almost one month and until the last moment to request intervention. Additionally, Sri Lanka, which claims that the May 7th modified order adversely affected its rights beyond the original order, knew or should have known then that the United States was not pursuing their interests when the United States requested and agreed to the modified order.

The Court concluded that the applications to intervene were untimely because the proposed intervenors slept on their rights and were seeking to intervene post-judgment at the very last moment, even though they were aware of all the proceedings pertaining to the case as discussed above. They made an affirmative decision not be part of this action, instead relying upon the United States to represent their interests. This was a calculated risk, and the consequences of that risk should be borne by the risk takers. The United States primary concern in litigation is to defend the interests of the United States, not those of other nations. *See Farmland Dairies,* 847 F.2d at 1044.

With respect to the balancing of prejudices, the Court found that the prejudice that would be felt by the existing parties to the action outweighed that which could occur to the proposed intervenors. While some courts have held that a trial court may have less discretion concerning motions to intervene that rest upon a statutory right, our appellate court has stated that

> We do not accept the proposition that a statutory right allows a potential party to sit by and, in the event of a choice of procedural tactics by the laboring party not to its liking, force the court to reconsider matters otherwise settled. Such a right may not be exercised in a fashion which encompasses 'Heads I win, tails you lose' tactics. We also do not agree with [the movant] that the courts should be particularly lenient in considering the timeliness of a request to intervene based on a statute. On the contrary, the quid pro quo for this right being unconditional is that it must be exercised promptly.

Sumitomo, 69 CCPA at 82, 669 F.2d at 708. The proposed intervenors filed their motions to intervene at the last moment, forcing the existing parties to scramble right before a national holiday and a few days before the time to appeal was to run. The Court held that the prejudice to the existing parties in the case of defending against two additional parties and the strong possibility that new issues will be raised on appeal, as exemplified in Sri Lanka's Rule 60(b) motion, outweighed the prejudice to the proposed intervenors who chose to rely on others for its rights up until the last moment. Further, the extra delay associated with the above could be significant.

According to the proposed intervenors, they would suffer prejudice in that the exporters of their respective countries would be once again subjected to countervailing duties. There is nothing prejudicial about the law being imposed as required by statute.

The Court also found no unusual or exigent circumstances present that would lean in favor of finding the motions to intervene timely filed

in this case. On the contrary, the lateness of the motions and possible interjection of issues that could expand the scope of the appeal militated strongly against the motions of the proposed intervenors.

Finally, the Court found that the proposed intervenors, the Governments of Peru and Sri Lanka, are experienced players in the area of international trade. There is no reason why they could not have intervened in this action, having participated in the administrative proceedings below. *See Farmland Dairies,* 847 F.2d at 1044.

For the above reasons, the Court ordered on July 2, 1992 that the motions of the Governments of Sri Lanka and Peru to intervene post-judgment be denied without prejudice to the proposed intervenors to make application to the Court of Appeals for the Federal Circuit for similar relief. The Court further ordered that all other applications in connection with the motions to intervene, including proposed intervenors' motions to extend the time to file a Notice of Appeal and Sri Lanka's Rule 60(b) motion for relief from judgment, be denied.

The effective date of the findings set forth in this opinion is July 2, 1992, the date this Court ruled on the motions discussed herein.

U.S. COURT OF INTERNATIONAL TRADE,
OFFICE OF THE CLERK,
New York, NY, July 10, 1992.

NOTICE

The United States Court of International Trade is considering certain proposed amendments to the court's Rules, and has authorized the publication of these proposals for public comment.

The proposed amendments were recommended by the court's Advisory Committee or the staff of the Clerk's Office. The proposals pertain to Rules 3, 7, 8, 12, 15, 24, 34, 35, 41, 44, 45, 47, 48, 50, 52, 53, 56.1, 71, 75, 77, 79, 82, 83, 84, 85 and 86, and new Rule 56.2 and new Form 17.

This notice is given to provide an opportunity for public comment upon the proposed amendments. The comment period is open until Wednesday, September 9, 1992.

A copy of the proposed amendments may be obtained by contacting Leo M. Gordon, Assistant Clerk at 212–264–7090.

JOSEPH E. LOMBARDI,
Clerk of the Court.

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Customs Bulletin and Decisions
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